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No. 92-179

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF OF PETITIONER

RICHARD L. HORSTMAN
MARATHON OIL COMPANY
7301 NW Expressway
Oklahoma City, OK 73132

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

January 22, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

2. Whether the award of punitive damages against TXO made in the absence of the procedural safeguards approved by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S.Ct. 1032, 1043 (1991), violated TXO's procedural due process rights.

PARTIES TO THE PROCEEDINGS

Petitioner TXO Production Corp. has been merged into Marathon Oil Company.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states that its parent company is USX Corp.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (Pet. App. 1a-52a) is reported at 419 S.E.2d 870 (W.Va. 1992). The separately filed concurrence of McHugh, C.J., of the Supreme Court of Appeals of West Virginia (Pet. App. 53a-54a) is reported at 419 S.E.2d 870, 895-96. The ruling of the Supreme Court of Appeals of West Virginia on the petition for rehearing (Pet. App. 77a) is not reported. The ruling of the Circuit Court of McDowell County, West Virginia, on petitioner's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, or, in the alternative, for remittitur, is not reported. The transcript of the proceeding on that motion is included in the Appendix to the Petition (Pet. App. 55a-74a), as is the court's written order (Pet. App. 75a-76a).

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on May 14, 1992. The petition for rehearing was denied on June 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of . . . property without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

A. The Underlying Title Dispute.

Petitioner TXO Production Corp. ("TXO") was an oil and gas production company that, at the time relevant to this dispute, did business in 25 states, including a small

operation it conducted in West Virginia.[1] In the summer of 1984, TXO sought to lease a tract of land in McDowell County, West Virginia, known as the "Blevins tract," for purposes of oil and gas exploration and production. Pet. App. 7a-8a. Respondent Tug Fork Land Company ("Tug Fork") held title to the oil and gas underlying the tract and had leased the oil and gas development rights to respondent George King. King, in turn, had assigned the lease to respondent Alliance Resources Corporation ("Alliance").[2] *Id.* In 1985, TXO and Alliance signed an agreement under which TXO would pay Alliance $20 per acre for its interest in the Blevins tract; Alliance would assign to TXO its full title and interest in the lease, reserving a royalty interest; and Alliance would reimburse TXO the consideration paid for the lease if TXO determined through title examination that title had failed as to all or any part of the leased premises. Pet. App. 8a-9a n.1.

Prior to drilling a well, TXO retained a West Virginia law firm to perform a title examination. Pet. App. 9a. TXO's attorneys opined that title was not clear, because in a 1958 deed, Tug Fork appeared to have conveyed to Leo J. Signaigo, Jr., the oil and gas rights to the Blevins tract, and that those rights were now held by Signaigo's successor in interest, Virginia Crews Coal Company ("Virginia Crews").[3] Pet. App. 9a; Tr. 388-90, 409-12.

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[1] TXO was acquired by USX Corporation in 1986. In 1990, TXO was merged into Marathon Oil Company, a wholly owned subsidiary of USX Corporation.

[2] The assignment by King to Alliance reserved a royalty interest to King and King's attorney, respondent Grover C. Goode. Tr. 565-66.

[3] In reaching this conclusion, counsel relied upon the language in the 1958 mineral deed to Signaigo, the non-assessment of any taxes on the mineral estate to Tug Fork and its successors, and importantly, the assessment and payment of taxes on the mineral estate by Virginia Crews and its predecessors in interest. *See* Rec. 1591, 1605, 1611-12 (Pl. Ex. 3).

The record in the Supreme Court of Appeals of West Virginia is cited herein as "Rec." The trial transcript begins at page 2177 of that record. The page numbers of the trial transcript are referenced as "Tr. ——"; they are not otherwise paginated in the record.

TXO's attorneys also were troubled by the fact that since 1958, Tug Fork had not been taxed by the State on the oil, gas, or coal in the Blevins tract. Rec. 1589 (Pl. Ex. 2).

TXO was unwilling to invest the more-than $200,000 necessary to drill an oil and gas well on the property until it had cleared any potential cloud on the title and was confident of its right to extract the oil and gas. See Pet. App. 12a. Based on its attorneys' advice, therefore, TXO obtained and recorded a quitclaim deed in which TXO was granted whatever rights Virginia Crews might have to the oil and gas rights in the property. Pet. App. 11a.

Thereafter, TXO called a meeting with Alliance to discuss TXO's title concerns. The parties were unable to reach any agreement, and shortly after that meeting, on August 23, 1985, TXO filed its complaint in the Circuit Court of McDowell County, West Virginia, for declaratory judgment to quiet title. Pet. App. 12a. Respondents counterclaimed for slander of title, alleging that the 1958 deed was unambiguous in reserving the entire oil and gas estate to Tug Fork and its assignees, that TXO had acted in bad faith by recording the quitclaim deed, and that TXO had done so to put a spurious cloud on the title in order to obtain royalty concessions from respondents.

B. Proceedings Below.

The action to quiet title and the counterclaim for slander of title were bifurcated. The quiet-title action was heard by the court on December 17, 1987. Without taking any evidence, the court ruled that title to the oil and gas estate was vested in Tug Fork, and that title to the coal rights only had been transferred to Virginia Crews. Pet. App. 12a; Rec. 691-722.

In June of 1990, the counterclaim for slander of title was tried before a jury. Over TXO's objections, respondents relied upon hearsay testimony of unrelated "other acts" of TXO. Pet. App. 21a-24a. Four attorneys from Louisiana, Oklahoma, and Texas were permitted to give their opinions concerning TXO's conduct in other cases that were wholly unrelated to the participants, facts, or underlying cause of action in the case at bar.[4] None of those cases even involved a claim for slander of title. *Id.* at 21a-24a. The trial court admitted this testimony under West Virginia's "catch-all" exception to the hearsay rule. *Id.* at 30a-32a.

In the first West Virginia case ever to recognize a cause of action for slander of title, the jury found for respondents, and awarded $19,000 to compensate them for their attorney's fees incurred in defending the quiet-title action brought by TXO. Pet. App. 12a, 20a. The jury's award indicated that there was no actual damages to respondents' property rights or to their ability to sell or lease the property, which are the usual measures of damage in slander of title actions. *Id.* The jury also awarded $10 million in punitive damages against TXO, an amount approximately 526 times the compensatory award.

TXO moved for judgment notwithstanding the verdict or, in the alternative, for remittitur, based, *inter alia*, upon the excessiveness and disproportionality of the punitive award and the absence of meaningful standards for the jury and the trial court. Pet. App. 55a-69a. The court, without any explanation, denied the post-trial motions from the bench. *Id.* at 72a.

The West Virginia Supreme Court affirmed. First, it rejected TXO's argument that TXO had been denied due process because it was not afforded the procedural safeguards approved in this Court's decision in *Pacific Mutual*

[4] The cases about which testimony was heard had either been settled or were still pending at the time this case was tried. One of the pending cases was subsequently tried, and a jury returned a verdict for TXO. Pet. App. 28a.

Life Insurance Co. v. *Haslip*, 111 S. Ct. 1032 (1991), and applied by the West Virginia Supreme Court itself in *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991) (on remand from the United States Supreme Court, 111 S. Ct. 2882 (1991)).[5] Pet. App. 7a, 32a. Second, the West Virginia court rejected TXO's argument that TXO had been denied due process because the punitive damages award was unconstitutionally excessive. *Id.* at 40a.

In *Garnes*, the West Virginia Supreme Court, "following the dictates of *Haslip*," had set out detailed procedures—similar to Alabama's punitive damages scheme approved in *Haslip*—for awarding punitive damages in compliance with the requirements of due process. *Garnes*, 413 S.E.2d at 908. These procedures were designed to provide "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review." 413 S.E.2d at 908. Under this new system, a West Virginia trial court is required, at a minimum, to explain five specific criteria to the jury for use in determining the appropriateness and size of a punitive award. Pet. App. 33a-34a (citing *Garnes*, 413 S.E.2d at 908-09). These same factors, plus four others, are to be taken into consideration by the trial court upon its review of the award. Pet. App. 34a (citing *id.* at 909). Finally, the West Virginia Supreme Court's review of a punitive damages award must be based upon the same factors. *Garnes*, 413 S.E.2d at 910.

The West Virginia Supreme Court acknowledged that it had "set out [the *Garnes*] guidelines to provide both procedural and substantive due process to defendants against whom punitive damages are awarded in accordance with the U.S. Supreme Court's directive in *Haslip*." Pet. App. 35a. The court denied those fundamental due process protections to TXO, however, declaring that to

[5] Both *Haslip* and *Garnes* were decided after TXO's *j.n.o.v.* motion had been ruled upon.

remand cases that were on appeal when *Garnes* was decided would "unnecessaryly send far too many cases back for retrial." Pet. App. 32a.

The West Virginia Supreme Court then undertook to review the punitive award under its newly minted "broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages." *Id.* at 35a. The court explained these new guidelines by stating:

> Generally, the cases fall into three categories: (1) really stupid defendants; (2) really mean defendants; and, (3) really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm.

Id. at 36a, 51a-52a. The court then pronounced that "[i]n cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is *roughly* five to one." *Id.* at 38a. By contrast, under West Virginia's new "test," "[w]here the defendant is not just stupid, but really mean . . . even punitive damages 500 times greater than compensatory damages are not *per se* unconstitutional under *Haslip* and *Garnes*." *Id.* at 39a.

The West Virginia Supreme Court characterized TXO's actions as a bad-faith attempt "to use the purported cloud as leverage for increasing its interest in the oil and gas rights." *Id.* at 11a-12a. Reasoning that the large award itself demonstrated that TXO had been "really mean," rather than "really stupid," the West Virginia Supreme Court concluded that the $10 million award against TXO did not violate due process, and affirmed the judgment. *Id.* at 40a, 42a.

SUMMARY OF ARGUMENT

In 1991, this Court expressed its "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043. This is that case—the

award of $10 million is grossly excessive and is the product of a system devoid of meaningful procedural constraints. The punitive award therefore violates both the substantive and procedural limitations that inhere in the Due Process Clause of the Fourteenth Amendment.

I.

It is well established that the Fourteenth Amendment's guarantee of fundamental fairness includes substantive limits beyond which penalties may not go. *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907). Punishment is not an end in itself, but rather a means of achieving social goals such as retribution and deterrence, and when a penalty far exceeds any amount rationally necessary to further a State's legitimate policy goals, it is by definition an arbitrary confiscation of property. Although this constitutional guarantee of due process applies to all state action, more rigorous due process review is warranted when the penalty is not imposed through general legislation, which embodies the powerful protections against arbitrariness afforded by democratic processes. Indeed, the danger of arbitrary government action is at its zenith when an unaccountable and unguided jury, exercising near-absolute discretion, awards punitive damages. Only meaningful due process review can, as the Fourteenth Amendment demands, adequately secure the individual from the arbitrary exercise of the powers of government. See *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909).

A. The $10 million punitive award imposed against TXO does not meet even the most minimal standards of fundamental fairness. That award bears no understandable relationship to compensatory damages or to the seriousness of petitioner's offense. *Haslip*, 111 S. Ct. at 1045. Despite the fact that petitioner's actions threatened only financial harm in a purely commercial setting, the challenged award is 20 times larger than any punitive damages award ever before upheld in West Virginia for any misconduct. And the award is more than ten times the

highest punitive award imposed in those extremely rare cases in which *any* punitive award was deemed appropriate for slander of title. The punitive damages in this case also far exceed any contemporary or historical legislatively determined penalty for similar conduct. Finally, the punitive damages awarded by the jury are 526 times greater than the compensatory award. Contrast *Haslip*, 111 S. Ct. at 1046 (punitive award of four times compensatory damages "was close to the [constitutional] line"). Where a jury-imposed penalty exceeds the bounds of fair play and decency established by contemporary and historical practice by *orders of magnitude*, absent a compelling and particularized justification, the jury verdict must be deemed arbitrary and excessive, and therefore a deprivation of property without due process of law.

B. There is no plausible argument that such an extraordinary penalty was necessary to meet West Virginia's legitimate goals. The only real justification offered by the court below for the staggering penalty assessed against TXO was the size of its corporate shareholder's "pocketbook." Of course, as this Court recognized in *Haslip*, large punitive awards cannot, consistent with due process, be justified on such a "deep pocket" theory. 111 S. Ct. at 1045.

Nor can the enormous size of the challenged award rationally be explained as necessary to further West Virginia's traditional goals in assessing punitive damages: retribution and deterrence. Viewed in light of the limiting principles embodied in West Virginia's chosen penal theories and all relevant objective indicia of rationality, it is patent that the $10 million award assessed against TXO greatly exceeds any amount that might fairly serve to punish TXO or to provide a permissible level of deterrence. At bottom, the extraordinary penalty assessed against TXO passes far beyond the bounds of reason and assumes the character of merely arbitrary fiat; it therefore violates the substantive limits of due process, and should be reversed.

II.

A. The $10 million punitive award was made and approved under procedures that violate due process. In *Haslip*, this Court left no doubt that due process requires States to provide procedural protections to ensure a "significantly definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages." 111 S. Ct. at 1045. In *Haslip*, the jury's "significant discretion was appropriately constrained by jury instructions and the two levels of judicial review undertaken by the state courts in that case. *Id.* at 1044-45. The procedure in this case falls far short of that provided by Alabama and approved by this Court in *Haslip*.

Here, the jury instructions did not provide guidance to the jury so that it could determine rationally the amount of punitive damages appropriate to further state goals. Instead, the jury was instructed specifically to base the amount of the punitive award on the wealth of TXO and its corporate affiliates. Because the sole concrete guidance the jury received in this endeavor was only barely, if at all, relevant, and was inherently prejudicial, the resulting award is unconstitutional.

Moreover, the arbitrariness of the punitive award was aggravated by the broad invitation given to the jury to award some undefined "additional compensation" to respondents. This instruction amounted to nothing more than an appeal to the jury simply to redistribute wealth from a large out-of-state corporation to resident litigants, which is plainly improper. *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 350 (1935).

Nor was the jury's award subjected to meaningful judicial review at either the trial-court or appellate level. Unlike the procedure in *Haslip*, here there were no preestablished criteria to guide review of jury-made punitive awards. Moreover, in *Haslip*, the trial court was required to make its findings on the record; by contrast, here, the trial court summarily denied TXO's challenge to the constitutionality of the award.

The "review" conducted by the West Virginia Supreme Court did nothing to eliminate the arbitrariness of the excessive award against TXO. Far from applying objective criteria, and carefully comparing the award to other awards and fines for similar conduct—steps approved by this Court in *Haslip*—the West Virginia court declared that where a punitive damages defendant was deemed to be "really mean," there is effectively no limit whatsoever on the magnitude of a punitive award. The court then held that in this case, the size of the award itself was enough to demonstrate that TXO was "really mean." Thus, the West Virginia Supreme Court approved the $10 million award against TXO on a basis that provides no meaningful constraint on an excessive award of punitive damages.

B. The procedure that was applied in this case not only failed to meet the *Haslip* standard, but also it was unconstitutionally vague. Clarity is especially important where, as here, a jury is making an award intended to serve as punishment, and not as compensation for injury, and such clarity is noticeably absent from West Virginia's punitive damages scheme. That scheme is contrary to all three related goals of the void-for-vagueness doctrine: to ensure that laws are sufficiently understandable to provide adequate notice of potential penalties; to establish clear guidelines that prevent juries from merely pursuing their personal predilections; and to permit meaningful judicial review. The lack of notice was particularly flagrant in this case, because TXO was assessed $10 million in punitive damages for a tort that had not been previously recognized in West Virgina.

ARGUMENT

Two Terms ago, this Court undertook to provide some guidance as to how punitive damages awarded by a jury should be scrutinized in a challenge under the Due Process Clause of the Fourteenth Amendment. The starting point for the Court's analysis was its recognition that "unlimited jury discretion—or unlimited judicial discretion for

that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991).

In *Haslip*, the procedural protections under Alabama law incorporated significant substantive elements, which had been applied to the defendant in that case. In particular, the Court identified the jury instructions and searching trial-court and appellate review guided by preestablished criteria as containing, in conjunction, significant protections to ensure against "extreme results" in a specific case. Because in *Haslip* those protections had kept the magnitude of the award within reasonable bounds, even if only barely, 111 S. Ct. at 1046, and because they had had "real effect" in other cases, *id.* at 1045, the Court affirmed the punitive award without deciding precisely what substantive limits the Fourteenth Amendment places on punitive damages.

The premise that procedural protections, if implemented with proper substantive requirements, will eliminate the need to set standards directly on the size of punitive awards under the Fourteenth Amendment is, in light of lower court decisions in the wake of *Haslip*, doubtful.[6] In this case, the West Virginia courts were completely unfaithful to the procedural mandate of the Court in *Haslip*. Moreover, the West Virginia Supreme Court chose to apply a form of appellate review that incorporated a substantive standard—unlimited awards for "really mean" defendants—that ensures that an extreme penalty imposed by the jury will go unchecked. Accordingly, the award in this case, because of its magnitude and because of the standardless method by which it was imposed, violates both the substantive and the procedural components of due process.

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[6] *See, e.g.*, Brief of Phillips Petroleum Co., *et al.*, as *amici curiae*, (citing cases demonstrating that courts have ignored *Haslip* and evaded this Court's mandate), and Brief of The Business Council of Alabama as *amicus curiae* (citing post-*Haslip* cases in Alabama to the same effect).

I. THE $10 MILLION PUNITIVE AWARD ASSESSED AGAINST TXO IS SO GROSSLY EXCESSIVE THAT IT CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Regardless of what procedures are mandated by the Fourteenth Amendment, there are also substantive constitutional limits "beyond which penalties may not go." *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907). See also *St. Louis Iron Mountain & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919) ("That [the Fourteenth Amendment] places a limitation upon the powers of the States to prescribe penalties for violations of their laws has been fully recognized"); *Standard Oil Co.* v. *Missouri*, 224 U.S. 270, 286 (1912) (due process guarantees that courts may "no more assess excessive damages than . . . impose excessive fines"). Accordingly, this Court for nearly a century has carefully scrutinized extra-compensatory penalties to ensure that they are not "so grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909). In *Southwestern Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915), for example, this Court reversed a $500 penalty for conduct that caused only $2 in actual harm, because that penalty "depart[ed] from the fundamental principles of justice embraced in the recognized conception of due process of law . . . [and] was so plainly arbitrary and oppressive as to be nothing short of a taking of [the defendant's] property without due process of law." *Id.* at 490-91.

Punitive damage awards—"quasi-criminal" penalties[7] imposed without the basic protections available in other penal contexts—should not be immune from rigorous judicial review. Unlike the *legislative* policy determinations reviewed, and in several cases invalidated, in this

[7] *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *See also Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The Court's cases abound with the recognition of the penal nature of punitive damages").

Court's earlier due process penalty decisions, jury awards of punitive damages typically are assessed without any legislative guidance. Thus, this Court's understandable reluctance to scrutinize under the Due Process Clause state *legislation* regulating business does not offer a proper model for reviewing individual jury awards. Deferential review of "economic" legislation does not rest on any general dissatisfaction with the ancient and unassailable doctrine that citizens are entitled to reasonable protections against arbitrary and irrational government action. Rather, its basis is the broader respect for democratic process and the institutional competency of the elected representatives of the States' citizens.[8] Where the State acts through legislation of general applicability, the State's important policy judgments—often having far-reaching effects on individuals—are made by those who have official responsibility for such policy decisions. This Court's modern due process decisions recognize that this democratic process usually provides adequate protection against the arbitrary exercise of government power.

Review of the punitive damages award challenged here, by contrast, requires no second-guessing of any legislative policy choice.[9] No democratic checks on the arbitrary

[8] *See, e.g., City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) ("the judiciary may not sit as a superlegislature to judge the wisdom or desirability of *legislative* policy determinations") (emphasis added); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("For protection against abuses by legislatures the people must resort to the polls, not the courts") (citation omitted).

[9] Indeed, because the jury in this case was given no meaningful guidance concerning how to further West Virginia's goals, *see infra* pp. 34-39, heightened due process review here does not even require second-guessing of a jury. And West Virginia's highest court, far from raising concern over interference with its punitive damage decisions, has expressly recognized that due process limits on punitive damage awards should be treated in a nationally uniform fashion. *See Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 905 (W.Va. 1991) ("We believe that the U.S. Supreme Court's adoption of punitive damages standards is a major step in the unification of America's decisional law in matters where the separate states are unable to craft a set of rational rules").

exercise of government power were involved here, and there was accordingly nothing to which a court properly could defer. See *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring) ("our scrutiny of awards made without the benefit of a legislature's deliberation and guidance [sh]ould be less indulgent than our consideration of those that fall within statutory limits"). Neither the citizens of West Virginia nor their elected representatives ever determined as a matter of state policy that $10 million could be a fitting punishment for slandering title, or that a sum even approaching that amount was appropriate to serve West Virginia's legitimate goals. To the contrary, TXO's punishment was meted out by a single jury, exercising near-absolute discretion. So long as West Virginia and other States leave to juries the task of implementing their penal goals on an *ad hoc* basis, only the continued availability of meaningful due process review can, as the Due Process Clause requires, "secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado* v. *California*, 110 U.S. 516, 527 (1884)).

It is therefore unsurprising that this Court, acting on its "concern about punitive damages 'run wild,'" *Haslip*, 111 S. Ct. at 1043, confirmed that there are limits beyond which punitive damage awards may not go. *Id.* ("general concerns of reasonableness . . . properly enter into the constitutional calculus"). Of course, even before *Haslip*, "it [was] not disputed that a jury award may not be upheld if it was the product of bias or passion." *Browning-Ferris*, 492 U.S. at 276. This Court recognized in *Haslip* that where a punitive damage award is large, a serious question is raised as to whether the jury's decision was animated solely by "deterrence and retribution, the state policy concerns sought to be advanced [by such awards]," 111 S. Ct. at 1044, and that a punitive damages award of "more than four times the amount of the compensatory damages" was "close to the [constitutional] line." *Id.* at 1046.

Because the punitive award in *Haslip* did not cross that line, this Court had no occasion to engage in any detailed reasonableness inquiry in that case. This case presents the opposite end of the due process spectrum. The $10 million penalty assesssed against TXO is so clearly excessive and strays so far from the traditional notions of fairness established by "history and wide practice," see *Schad* v. *Arizona*, 111 S. Ct. 2491, 2500 (1991), that it clearly violates "fundamental fairness . . . [and] the rationality that is an essential component of that fairness." *Id.* at 2501. Moreover, even if the violation were not as clear as it is here, nothing in the record below or any plausible policy concern of the State can support the penalty imposed by this jury. Accordingly, West Virginia plainly has deprived TXO of property without due process of law.

A. The $10 Million Punitive Award Assessed Against TXO Far Exceeds All Objective Standards Of Fairness Established By History And Wide Practice.

West Virginia found TXO's conduct violative of a tort standard embodied in no prior West Virginia decision, and included in the laws of other jurisdictions only in very different form. See *infra* pp. 47-48. That conduct threatened no harm to any person or property and caused only a modest financial injury—the loss of $19,000 in attorney's fees. Nonetheless, TXO was assessed with a multi-million dollar punitive award that was *526 times* as great as the injury it had inflicted, and more than *20 times* higher than any punitive award ever before upheld in West Virginia for *any* tort. On these facts, there is simply no plausible argument that the challenged award meets even the most minimal standards of fundamental fairness. Instead, the $10 million award "jar[s] one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043.

Of course, such relative determinations need not (and, indeed, cannot) be made strictly in a vacuum. This Court has long noted the "importance of history and widely shared practice as concrete indicators of what fundamen-

tal fairness and rationality require." *Schad*, 111 S. Ct. at 2500. Thus, the fundamental fairness determination is properly informed by such objective indicia of fairness as (1) awards upheld against other defendants in the same jurisdiction, (2) awards upheld for similar conduct in other jurisdictions, (3) legislative penalty decisions with respect to similar conduct, and (4) the relationship of prior punitive awards to the associated compensatory awards. Each of these provides an objective indicator of the magnitude of the penalty necessary to further legitimate state goals. Tested against these objective standards, the challenged award is clearly excessive.[10]

When measured against the punitive awards upheld against other West Virginia defendants, the challenged award clearly is "grossly out of proportion to the seriousness of the offense." See *Haslip*, 111 S. Ct. at 1045. The misconduct alleged here involved neither violence nor threat of violence to any person or property.[11] No dangerous or potentially dangerous instrumentality was involved. No person's honor, dignity, or reputation was harmed or even threatened. It was nothing more than a commercial dispute.[12] Slander of title threatens only financial harm,

[10] Although in this case the challenged award far exceeds the standards of fairness established by *all four* objective indicia, a particularized due process scrutiny should be triggered whenever even one or two of these indicia suggest that a punitive award reflects jury bias rather than a means to effect legitimate state goals.

[11] It is beyond doubt that where punishment is concerned, society is far more protective of people than property. *See, e.g., Solem* v. *Helm*, 463 U.S. 277, 293 (1983); *Eisert* v. *Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 229 (Minn. 1982) (decision to deny punitive awards where injury is limited to property damage "reflects the higher value our society places on the safety of persons than it does on the security of property"); *Slough* v. *J.I. Case Co.*, 650 P.2d 729 (Kan. Ct. App. 1982) (reducing punitive award because "there was a minimum of evidence to indicat[e] a danger of physical injury to persons as a result of [appellant's] conduct").

[12] *See Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs.*, 596 A.2d 687, 710 (Md. Ct. Spec .App. 1991) (Jury awarded

and even that harm is limited by the finite value of the relevant property interest. In this case, the jury found that because TXO's misconduct in no way decreased the value of respondents' property interest, there was no direct financial injury. Notwithstanding these facts, the jury imposed on TXO a punishment *20 times larger than any ever before upheld in West Virginia for any misconduct.*[13] Whatever may be said of the exact placement of the offense of slander of title on the scale of relative seriousness, there clearly is no rational basis to conclude that it is an evil so great that it deserves the State's most serious monetary sanction (or, indeed, even that it deserves an above-average sanction).[14] A sanction 20 times greater than the previous record award is surely excessive under these circumstances.

The exceptional nature of this award is even starker when viewed in light of punitive awards for slander of title in other jurisdictions. Although the tort of slander

$250,000 in compensatory damages and $40 million in punitive damages; trial court remitted punitive damages to $12.5 million. Court of appeals vacated and remanded for a new trial, observing "[t]his was, at bottom, a commercial dispute between two business competitors"), *cert. denied*, 605 A.2d 137 (Md. 1992).

[13] Appendix A lists West Virginia punitive awards upheld on appeal, as well as those reversed on appeal.

[14] Comparison to awards upheld against other defendants in the same jurisdiction constitutes an especially important indicator of rationality given the real danger of discrimination against nonresident defendants. West Virginia itself has recognized that unchecked jury discretion "[i]nevitably . . . leads to increasing efforts to redistribute wealth from without the state to within." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W.Va. 1991). *See also id.* at 905 ("this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill"). The *Garnes* discussion was not idle speculation—the four highest punitive awards ever affirmed in West Virginia, including the decision below, were assessed against out-of-state defendants. *See Jarvis* v. *Modern Woodmen of Am.*, 406 S.E.2d 736 (W.Va. 1991); *Berry* v. *Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W.Va. 1989); *Bell* v. *Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985). Such unprincipled redistribution of wealth by a jury is inherently arbitrary.

of title is longstanding in other states, no court in any jurisdiction has *ever* affirmed a multi-million-dollar punishment for slander of title,[15] and in only five cases has the punitive award ever exceeded $100,000.[16] Indeed, TXO's research has uncovered fewer than 40 cases in this nation's history in which *any* punitive award was deemed appropriate for slander of title. The median punitive award in those cases (in 1991 dollars) was approximately $26,000, less than one-third of one percent of the penalty imposed here.

The challenged award also widely diverges from historical practice. In this regard, the excessiveness of the award against TXO is demonstrated by its enormous divergence from the tempered and consistent judgment of history. Civilized societies have long limited to moderate amounts punitive awards for harms to property or financial interests that are not particularly amenable to concealment. See, *e.g.*, Exodus 22:9 ("For all manner of trespass [to goods], . . . whom the judges shall condemn, he shall pay double unto his neighbor"); Exodus 22:1 ("If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep"); Statute of Gloucester, 6 Edw. I, ch. 5 (1278) (treble damages for waste), *cited in Browning-Ferris*, 492 U.S. at 274; W. Buckland, *A Textbook of Roman Law* 577-79 (1921) (noting that under the Law of the Twelve Tables, some victims of theft were allowed to recover twice the value of the stolen property).

Moreover, TXO's punishment far exceeds any legislatively determined punishment for such conduct. Legislative judgments are particularly valuable guides to proportionality, because the legislature is responsible for establishing the entire scheme of civil and criminal sanctions. Indeed, as the West Virginia Supreme Court held in a similar case involving property damage:

> Upon this question of the measurement of punitive damages we have some statutes allowing a recovery of double damages or treble damages where a trespass is committed wantonly and maliciously, and while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard . . . .

Pendleton v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (W.Va. 1918). Although West Virginia has no damage cap directed specifically at slander of title (no such cause of action was recognized in West Virginia until the decision below), the West Virginia legislature has determined that trebling compensatory damages fully serves West Virginia's punishment goals in similar contexts in which the misconduct threatens only financial or property damage.[17] Other state and federal legislatures have made similar determinations.[18] And where legislatures have imposed fines for slander of title and similar conduct, those fines have always been measured in thousands, not millions, of dollars.[19]

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[15] Appendix B lists published slander of title decisions that included punitive awards.

[16] *See* Appendix B. In *Summa Corp.* v. *Greenspun*, 655 P.2d 513 (Nev. 1982), a $1 million punitive award was affirmed in a slander of title case. Although it is only a tenth as large as the punishment imposed here, that punitive award is, in light of the overwhelming evidence of history and wide practice, also constitutionally suspect. It bears noting that Summa Corp.'s agent, and the individual responsible for the slander of title, was Howard Hughes, a well known and controversial figure.

[17] *See, e.g.*, W.Va. Code §§ 37-7-4 (treble damages for waste), 37-7-5 (same), 61-3-48a (1992) (treble damages for carrying any trees from another's land).

[18] Appendix C lists selected state statutes placing limitations on punitive damages awards in cases involving similar or analogous conduct, as well as in cases involving personal injury, fraud, and civil remedies for crimes. *See also* 15 U.S.C. § 15 (1985) (treble damages for violation of antitrust law); 40 U.S.C. § 489(b)(1) (1992) (double damages for fraud on the United States government).

[19] Most state slander of title statutes specify only actual damages and costs, not punitive damages. *See, e.g.*, Cal. Civ. Code § 880.360 (West 1992); Conn. Gen. Stat. Ann. § 47-33j (West 1990); Ind. Code Ann. § 32-1-5-9 (Burns 1992); Kan. Stat. Ann. § 58-3410

Nor does the challenged award bear any "understandable relationship to compensatory damages." See *Haslip*, 111 S. Ct. at 1045. As West Virginia's highest court has recognized, "[a]s a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E. 2d 897, 909 (W.Va. 1991).[20] Before this case, the West Virginia courts had *never*, in any case, upheld

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(1983); Mich. Comp. Laws Ann. § 565.108 (West 1991); Neb. Rev. Stat. § 76-296 (1991); N.D. Cent. Code § 47-19.1-09 (1991); Okla. Stat. Ann. tit. 16, § 79 (West 1991); Wyo. Stat. § 34-10-109 (1992).

Those States that have seen fit to provide for punitive damages have designated amounts far smaller than those assessed in the present case. *See, e.g.*, Ariz. Rev. Stat. Ann. 33-420(A) (1992) (title slanderer liable to title holder "for the sum of not less than five thousand dollars, or for treble the actual damages caused by the recording or filing, whichever is greater, and reasonable attorney fees and costs"); Cal. Penal Code § 115.5(a) (Deerings 1993) (person who files false document which affects title to a residence containing not more than four dwelling units "is punishable, in addition to any other punishment, by a fine not exceeding seventy-five thousand dollars"); Colo. Rev. Stat. § 38-35-109(3) (1992) (civil liability for unreasonably filing false lien is $1000 or actual damages, whichever is greater, plus attorney fees); Wis. Stat. Ann. § 706.13 (West 1989-90) (person who slanders title "is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1000 plus any actual damages caused thereby").

[20] The idea that punitive awards should be determined by reference to the compensatory award was well established even before the Fourteenth Amendment was adopted. *See, e.g., Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852) ("the exemplary damages allowed should bear some proportion to the real damage sustained"). *See also Hunter* v. *Kansas City Rys.*, 248 S.W. 998, 1002 (Mo. App. 1923) ("Exemplary damages should bear some reasonable proportion to the actual damages sustained"); *Mobile & Montgomery R.R.* v. *Ashcraft*, 48 Ala. 15, 33 (1872) (same); *Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480 (1882) (same). Although many courts phrase this relationship requirement in terms of the ratio between punitive damages and the *harm* caused, the modern measure of compensatory damages, informed as it is by concepts of actual injury and proximate causation, provides a fair proxy, in most cases, of that harm.

a punitive award greater than 10 times the associated compensatory damages for any cause of action. Moreover, in all but three of the cases from other jurisdictions in which a punitive award was found appropriate in a slander of title action, the approved ratio of punitive to compensatory damages was *less than four to one*, and the highest such ratio was nine to one. See Appendix A. Here, by contrast, the punitive damages award was more than *500* times the compensatory award.

In *Haslip*, this Court observed that a punitive award of four times compensatory damages was "close to the [constitutional] line." 111 S. Ct. at 1046. Fundamental fairness review, like most constitutional exercises, may not admit of bright-line distinctions. Here, however, *all* of the relevant objective indicia demonstrate that the $10 million award against TXO strays far beyond any traditional notions of fairness established by history and wide practice. Where the challenged award exceeds the bounds of contemporary and historical practice by *orders of magnitude*, absent compelling and particularized justification, the award is clearly arbitrary and excessive, and therefore unconstitutional.

B. The $10 Million Punitive Award Assessed Against TXO Far Exceeds Any Amount Plausibly Necessary To Further West Virginia's Legitimate Goals.

This is not to say, of course, that all $10 million punitive awards are *per se* unconstitutional. Perhaps there is some misconduct for which a State could justify such an extraordinary penalty as necessary to meet its legitimate goals. If such a case exists, this is not that case.

The only real justification offered by the court below for the staggering penalty assessed against TXO was that its corporate shareholder has a large "pocketbook." Soaking large out-of-state corporations is, however, *not* a legitimate state goal. Moreover, because any relationship between corporate wealth and legitimate punishment goals is tenuous at best, this Court recognized in *Haslip* that

large punitive awards cannot be justified on a "deep pocket" theory. See *Haslip*, 111 S. Ct. at 1045.

Nor can the size of the challenged award be explained rationally as necessary to further West Virginia's traditional goals in assessing punitive damages, retribution and deterrence. Viewed in light of the limiting principles embodied in West Virginia's chosen theories of punishment and all of the relevant objective indicia of rationality, it is clear that the $10 million award assessed against TXO greatly exceeds any objectively based deterrent as well as any amount that might fairly serve to punish TXO. It is punishment without purpose, and therefore a constitutionally excessive deprivation of property without due process of law.

1. *The "Deep Pocket" Theory Adopted By The Court Below Cannot Justify The $10 Million Penalty Assessed Against TXO.*

The court below offered three possible justifications for the extraordinary penalty assessed against TXO—that the conduct was reprehensible, that the potential harm was great, and that the defendant was wealthy. With respect to reprehensibility, however, the West Virginia court offered only its observation that "the jury's verdict says more than we can say in an opinion twice this length." Pet. App. 40a. But this argument is circular: the size of the verdict justifies the size of the verdict. In any event, comparisons to other awards completely undermines the argument that TXO's conduct was "reprehensible" to the tune of $10 million.

Similarly, with respect to potential harm, the court noted only that the "type" of conduct undertaken by TXO "could potentially cause millions of dollars in damages" if repeated in other cases. *Id.* Of course, *every* type of tortious conduct could cause "millions of dollars in damages" under the right (or wrong) circumstances. If stating as much is enough to justify a multi-million dollar punitive award in every case where there was *not* millions of dollars in damage, or even a realistic possibility of

such injury, then the Constitution's guarantee of fundamental fairness is without content in the punitive damages context.

That leaves only wealth. See *id.* at 42a ("it is the pocketbook of USX that the jury verdict must reach"). Although evidence of wealth may *explain* the extraordinary verdict in this case,[21] it surely cannot *justify* it. The relevance of preexisting wealth to the goals of deterrence and (at least where corporations are concerned) retribution is doubtful at best. See *infra* note 25. Moreover, it is beyond doubt that telling the jury that wealth is an appropriate measure of punishment—especially where, as here, that is the *only* concrete measure offered—invites the jury to act on bias, passion, and prejudice, rather than the State's legitimate social goals. See *infra* pp. 35-38. Thus, as this Court warned in *Haslip*, a penalty may not, consistent with due process, be justified solely on the basis of a defendant's wealth. *Haslip*, 111 S. Ct. at 1045 (plaintiffs may not "enjoy a windfall because they had the good fortune to have a defendant with a deep pocket"). Such purely arbitrary redistribution of wealth from defendant to plaintiff serves no legitimate state interest,[22] and can only be characterized as fundamentally unfair.

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[21] Indeed, the Court need look no further than the closing argument, the jury verdict, and the decision below to conclude that petitioner was punished—and punished hard—not because the punishment was deserved or necessary to deter similar misconduct, but because petitioner was part of a large out-of-state corporation. The only *measure* of punitive damages provided to the jury was wealth (of petitioner *and* its corporate affiliates). *See infra* pp. 35-38. Similarly, the only measure of punitive damages applied by the reviewing court was wealth (this time of petitioner, its corporate affiliates, *and* its stockholder). Pet. App. 42a.

[22] *See, e.g., Gertz* v. *Welch, Inc.*, 418 U.S. 323, 349 (1974) ("States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury").

2. *The Punitive Award Assessed Against TXO Greatly Exceeds Any Amount That Might Fairly Serve As Retribution For TXO's Misconduct.*

Retributive theory, which has its foundations in conceptions of fairness—the principle of "just desert"— relies on the premise that some tortfeasors are morally "deserving" of extra-compensatory sanction. See I. Kant, *The Metaphysical Elements of Justice* 99-107 (Bobbs-Merrill ed. 1965). Accordingly, as this Court and the courts of West Virginia have long recognized, a punitive measure serves a State's retributive goals only if punishment is deserved.[23]

Of course, determining that a tortfeasor deserves *some* extra-compensatory punishment does not answer the question *how much* punishment is deserved. However, "to punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice." Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989). See also *Massachusetts Bonding Ins. Co.* v. *United States*, 352 U.S. 128, 133 (1956) ("By definition, puni-

[23] *See, e.g., Felton* v. *United States*, 96 U.S. 699, 703 (1877) ("All punitive legislation contemplates some relation between guilt and punishment. To inflict the latter where the former does not exist would shock the sense of justice of every one"); *Lake Shore & Mich. S. Ry.* v. *Prentice*, 147 U.S. 101, 115 (1893) ("No man should be punished for that of which he is not guilty"); *State ex rel. C.A.H.* v. *Strickler*, 251 S.E.2d 222, 225 (W.Va. 1979) ("The State may not punish a person not deserving of punishment").

Thus, to the extent that any of the punishment challenged here was directed at TXO's corporate affiliates—and the reviewing court's discussion of pre-existing wealth makes clear that some portion of the award was directed at those affiliates, *see* Pet. App. 41a-42a—that portion of the award cannot be justified on retributive grounds. Only employees and agents of TXO were involved in the misconduct alleged here. Neither USX Corporation nor any of its subsidiaries was in any way involved. Only later did USX become the owner of TXO. Having committed no wrong, neither USX nor its non-TXO corporate affiliates are deserving of punishment. *See generally* Brief of Washington Legal Foundation as *amicus curiae*.

tive damages are based upon the degree of the defendant's culpability"). This principle of "proportionality" between punishment and offense, and its constraining role on retributive penalties, has been recognized by all civilized societies.[24]

And "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U.S. 277, 284-85 (1983). In 1215, three chapters of Magna Carta were devoted to the rule that "amercements"—"all-purpose" monetary sanctions used to penalize both criminal and civil wrongdoing, *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 269 (1989)—must be proportional to the offense. See, *e.g.*, A. Pallister, *Magna Carta: The Heritage of Liberty* 113 (1971) (Magna Carta provides, at ch. XIV, that "[a] Freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof"). The proportionality principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275), *cited in Solem*, 463 U.S. at 284-85, and courts relied on these proportionality guarantees to invalidate disproportionate punishments. See, *e.g., Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3, 5 (1934) (amercement vacated and bailiff who imposed amercement ordered to "take a moderate amercement proper to the magnitude and manner of that offence"), *cited in Browning-Ferris*, 492 U.S. at 289 (O'Connor, J., concurring in part and dissenting in part).

[24] *See, e.g.*, Aristotle, *Nicomachean Ethics*, in 9 *Great Books of the Western World* 379-81 (W. Ross ed. 1952) (justice consists of rendering equal the offense and the consequences of the action); Exodus 21:24 ("Eye for eye, tooth for tooth . . ."); Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 844 (1969) (noting a similar equality between offense and penalty in the laws of the Angles and Saxons of pre-Norman England as well as the Germanic peoples of the Middle Ages and the Norse Vikings).

Accordingly, this Court has explicitly recognized for more than a century that, as a matter of due process, the "just desert" rationale of retributive justice inherently limits a retributive penalty to an amount proportional to the wrong inflicted. See, *e.g.*, *Weems* v. *United States*, 217 U.S. 349, 349 (1910) ("it [is] . . . a precept of justice that punishment . . . should be graduated and proportional to offense"). See also *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 77 (1971) (Harlan, J., dissenting) ("most of our jurisprudence proceeds upon the premise that legislative purposes can be achieved by fitting the punishment to the crime"). Indeed, this Court's earliest decisions dealing with extra-compensatory damage awards recognized the proportionality requirement inherent in any award of "vindictive" damages. See, *e.g.*, *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) ("a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, *having in view the enormity of his offence*") (emphasis added). Thus, a punitive award cannot, consistent with any rational application of the retributive theory of punishment, be "wholly disproportioned to the offense." *St. Louis Iron Mountain & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919).

It is difficult to conceive of a State adopting a retributive theory of punishment unlimited by any proportionality principle. Apart from what this case may suggest, it is clear that West Virginia has not done so. Indeed, the proportionality principle is expressly stated in the West Virginia constitution. See W.Va. Const., Art. III, § 5 ("Penalties shall be proportioned to the character and degree of the offense"). See also *Wanstreet* v. *Bordenkircher*, 276 S.E.2d 205, 214 (W.Va. 1981) (allowing an excessive sentence "would ignore the *rationality* of our criminal justice system where penalties are set according to the severity of the offense") (emphasis added). Thus, disproportionate punitive awards do not serve West Virginia's retributive goal of punishment.

The award challenged here is 20 times higher than any punitive damages award ever upheld in West Virginia in

any type of case. See Appendix A. Moreover, no other jurisdiction has ever declared slander of title deserving of punishment of this magnitude. See Appendix B. And legislators who have considered the issue uniformly have placed slander of title and, more generally, torts which threaten only financial harm, at the lower end of the retributive scale. See Appendix C. Simple logic and all relevant objective indicators demonstrate that the $10 million award against TXO reflects bias and prejudice rather than any considered retributive judgment, and therefore must be set aside. See *Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring in judgment) ("the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case").[25]

3. *The Punitive Award Assessed Against TXO Greatly Exceeds Any Amount That Might Rationally Be Justified To Deter Similar Conduct.*

Deterrence theory permits the assessment of extra-compensatory damages against a tortfeasor for the purpose of discouraging similar conduct. The premise of deterrence theory is that a person will not act irrationally by doing something that is expected to lose money. Adding to the penalty associated with an activity decreases the

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[25] The pre-existing wealth of TXO and its corporate affiliates plays no relevant role in the retributive calculus. As Judge Easterbrook recently noted:

> Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. *L'Oreal, S.A.*, No. 91-2842, 1992 WL 314270 (7th Cir. Nov. 6, 1992). *Cf. City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (noting general refusal to allow punitive damages against municipal corporations because "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers").

expected profitability of that activity, and the incentives to engage in misconduct are thus reduced. Accordingly, a rational application of deterrence theory produces a punitive award just sufficient to persuade individuals not to engage in the activity that the State condemns.[26]

In examining the reasonableness of the fit between the $10 million award in this case and the goal of deterrence, the starting point should be the theory of deterrence adopted by the State, as applied to this tort. As applied here, West Virginia rightly seeks to deter the filing of false claims to property to obtain economic advantage in dealings with the owner of that property. In this context, the title slanderer's gain is no greater than the harm he can impose on the true owner by lowering the property's value. Accordingly, assessing a damage award that fully recovers the actual harm to the party whose title has been slandered would have the effect of removing *all* gains from the wrongful activity, thereby effectively deterring that activity.[27]

If every tort were detected and penalized, no punitive award would be necessary to further the State's deter-

[26] West Virginia recognizes that there are substantial social costs associated with overdeterrence. *See, e.g., Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 903 (W.Va. 1991). *See also Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) ("severe . . . penalties will chill wholly legitimate business agreements"). Indeed, the decision below expressly recognized the problem of overdeterrence. See Pet. App. 15a ("Although we want to discourage people from slandering the title of others, we do not want to discourage people from making legitimate (though possibly weak) claims of their own"). The award in this case hardly balances those goals.

[27] It is important to recognize that this narrow analytic form of means-end testing does *not* rest on any requirement that States adopt any particular economic theory; rather due process means-ends testing requires only that a State, having itself adopted a theory grounded in certain basic economic principles, rationally apply that theory and those principles. *Compare Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992) *with Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336 (1989).

rence goal. See, *e.g.*, Dobbs, *supra*, 40 Ala. L. Rev. 831, 893 ("Appropriate deterrence will be achieved, in general, if all victims sue and fully recover").[28] But some tortfeasors may escape detection and punishment, and therefore the penalty may, when inflicted, be greater than the harm caused by the activity. If, for example, only one in three tortfeasors is likely to be caught and punished, the punitive award is properly set at twice compensatory damages, for a total award (compensatory plus punitive) of three times compensatory damages. See, *e.g.*, *Zazu Designs* v. *L'Oreal, S.A.*, No. 91-2842, 1992 WL 314270 (7th Cir. Nov. 6, 1992) ("Punitive damages are appropriate when some wrongful conduct evades detection; a multiplier then both compensates and deters").

Thus, the more easily a defendant may conceal his conduct, the larger the multiple of compensatory damages (or, in other contexts, expected gains) necessary to provide the appropriate deterrent incentive. Simple logic dictates that the enormous multiplier (526 times compensatory damages) used in this case bears *no* rational relation to the relevant likelihood of concealment. The conduct alleged here is *publication*, to the world at large, to the State (through the recording of a deed and the institution of legal proceedings), *and* directly to the putative victim, of a false claim to property. Obviously, the risk of concealment in this context is virtually nonexistent. And, although one can imagine cases in which victims do not

[28] West Virginia has long recognized this concept. *See, e.g., Mayer* v. *Frobe*, 40 W.Va. 246, 260 (1895) ("if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong"). *See also Memphis Community School Dist.* v. *Stachur*, 477 U.S. 299, 307 (1986) ("Deterrence is also an important purpose of [the § 1983] system, but it operates through the mechanism of damages that are compensatory"). *See also Haslip*, 111 S. Ct. at 1045 (approving Alabama's post-verdict standards that ensure punitive damages awards "have some understandable relationship to compensatory damages").

detect slander of their title, slander of title is not the sort of conduct, like insurance or consumer fraud, for example,[29] where active concealment plays a large role. If the title slanderer hopes to profit from his misconduct, the false claim must be disclosed to the public or the putative victim.[30]

Accordingly, on a relative scale, a rational deterrence-based punitive damage multiplier in a slander of title case would fall somewhere in the middle of the range of appropriate multipliers—less than the multiplier for a tort, like consumer fraud, to which active concealment is crucial, but more than the multiplier for a tort like battery, in which detection is instantaneous and prosecution almost certain. The probability of apprehension and conviction approaches unity in typical tort cases.[31] Thus,

[29] An extreme example is *Boise Dodge* v. *Clark*, 453 P.2d 551 (Idaho 1969), in which the defendant car dealership rolled back odometers on the demonstrator cars it sold, representing them as new. The court justified a punitive damage award of approximately 35 times the compensatory award based upon its estimate that few purchasers would discover the illegal conduct.

[30] One factor that plainly is *not* relevant in setting a deterrence-based award is the defendant's pre-existing wealth. For the rational actor posited by the deterrence theory, the decision whether to pursue a particular activity turns on the expected costs and benefits *from that activity* alone. *See, e.g.*, Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989) ("a rational, risk-neutral, profit-motivated corporation, regardless of its size, will refrain from any act that has associated expected costs exceeding the associated expected gains for the corporation"); 2 American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Use* 254-55 (1991) ("what is relevant [to deterrence] is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity in question"). *See also* Brief of the American Tort Reform Association, *et al.*, as *amici curiae*.

[31] *See, e.g.*, Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 31 (1975). *See also* Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1178 (1989) ("enforcement error is more likely to be of the magnitude of 2/1 or smaller, possibly rising to as high as 10/1 in cases of fraud").

not surprisingly, empirical studies demonstrate that juries and judges faced with the task of assessing an appropriate deterrent award generally impose multipliers of less than four in tort cases.[32] The $10 million award here, by contrast, embodies a multiplier of *526*, more than 100 times the multiplier appropriate in the average tort case, despite the fact that *nothing* about this case indicates that TXO's conduct was easily concealed. There is, of course, no "mathematical bright line betwen constitutionally acceptable and . . . unacceptable," *Haslip*, 111 S. Ct. at 1043, but whatever the appropriate scope of review, it is patent that the punitive award against TXO far exceeds any amount plausibly necessary to achieve West Virginia's deterrence goal of punishment.[33]

In sum, the extraordinary penalty assessed against TXO in this case cannot plausibly be justified as necessary to further any legitimate state goal. This Court has long insisted that the interests protected by the Due Process Clause "not be interfered with . . . by [state] action which is arbitrary or *without reasonable relation to some purpose* within the competency of the State to effect." *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923) (emphasis added). See also *Haslip*, 111 S. Ct. at 1045 (approving Alabama scheme designed to ensure that a punitive award "does not exceed an amount that will accomplish

[32] *See, e.g.*, Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 60 (1990) (citing empirical evidence that the median ratio of punitive damages to other damages ranges from one to four).

[33] A survey of West Virginia's own punitive damages decisions demonstrates that even in cases of insurance fraud and other easily concealed torts a multiplier of less than ten has been thought sufficient to serve the State's deterrence goals. *See, e.g.*, *Painter* v. *Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596 (W. Va. 1984) (multiplier of 7.6 for fraud). *See also* Appendix A (multipliers ranging from less than one to 10.6). Indeed, only one West Virginia case ever upheld a multiplier of 10. *Id.* It is thus inconceivable that the decision here to uphold the punitive award with a multiplier of 526 is the result of a rational application of West Virginia's chosen deterrent theory.

society's goals of punishment and deterrence"); *id.* (punitive awards should be "rational in light of their purpose to punish what has occurred and to deter its repetition").[34]

Meaningful means-ends review of out-of-the-ordinary punitive awards preserves to the States broad discretion in implementing their goals. The rationality component of the Due Process Clause requires only that States ground such punitive awards in *some* legitimate theory, and that those awards not exceed the outer limits imposed by reasonable application of the chosen theory. Clearly, punishment that goes far beyond the traditional notions of fairness established by history and wide practice *and* far beyond that called for by the State's own announced justifications lacks any legitimacy whatsoever. Thus, there exists a strong constitutional foundation for narrow analytical testing of consistency between means and ends when a State imposes a penalty that is out of the ordinary, and under that standard of reasonableness, the award in this case clearly fails.

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[34] *See also Moore* v. *City of East Cleveland*, 431 U.S. 494, 520 n.16 (1977) (due process is violated where government employs "a means not reasonably related to the ends it seeks to achieve"); *id.* at 498 n.6 (this Court's cases have *never* departed from "the [basic] requirement that the government's chosen means must rationally further some legitimate state purpose").

Meaningful means-ends review is, of course, a common mode of constitutional analysis. Bail, for example, is constitutionally excessive if it is "set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose of bail," namely, ensuring the presence of the defendant. *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951). Similarly, criminal conduct can be penalized with death only if that punishment reasonably serves a State's asserted purposes of retribution and deterrence. *See, e.g., Enmund* v. *Florida*, 458 U.S. 782, 800-801 (1982). And means-ends rationality has long been the accepted mode of applying the Equal Protection guarantee of the Fourteenth Amendment. *See, e.g., City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation").

To be sure, not all large punitive damage awards are constitutionally defective. But it is settled that punitive awards must bear some reasonable relationship to the purposes articulated by States in assessing such punishment or fail to satisfy the minimum requirements of fundamental fairness mandated by the Due Process Clause. Modest and measured punitive awards were familiar to the Framers of the Constitution and the Fourteenth Amendment,[35] and they survived without constitutional challenge for the better part of two centuries. The award here, by contrast "passes the bounds of reason and assumes the character of merely arbitrary fiat." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204 (1912).

II. WEST VIRGINIA'S PROCEDURE FOR AWARDING PUNITIVE DAMAGES IN THIS CASE FAILED TO SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The Due Process Clause requires that fundamentally fair procedures be provided before a State may take property or, as here, transfer property from one person to another. See *North Ga. Finishing, Inc.* v. *Di-Chem Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974). Critical to this concept in the context of punitive damages is the requirement that jury discretion be channelled in furtherance of legitimate State purposes, and restrained from improper expression of bias, prejudice, or emotion. Thus, *Haslip* leaves no doubt that due process requires States to provide procedural protections that establish a "significantly definite and meaningful constraint on the discretion of . . . fact finders in awarding punitive damages." 111 S. Ct. at 1045. In *Haslip*, where the ratio of punitive damages to compensatory damages was four to one, the Court concluded that the jury's "significant discretion" was appropriately constrained by jury instructions and the two levels of

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[35] *See, e.g.*, Brief of the United States Chamber of Commerce, *et al.*, as *amici curiae*, and Brief of the American Tort Reform Association, *et al.*, as *amici curiae*.

meaningful judicial review undertaken by the state courts in that case. *Id.* at 1044-45.

The procedure afforded to TXO in this case fell far short of the *Haslip* standard. Whereas in *Haslip*, the jury instructions provided helpful guidance to the jury, *id.* at 1044, in this case, the jury instructions served affirmatively to *mis*guide the jury by encouraging it to place emphasis on a largely irrelevant and highly prejudicial factor, the wealth of TXO and its corporate affiliates. Nor was there any countervailing curb on the arbitrariness of the jury's award in the form of careful judicial review. No preestablished meaningful and tested criteria existed to guide the trial or appellate court in examining the punitive award entered by the jury in this case. To the contrary, the trial court summarily rejected TXO's post-trial challenges to the punitive damages award, and the West Virginia Supreme Court affirmed, justifying the result based on its subjective and standardless assessment that TXO had been "really mean."

The West Virginia courts' failure to comply with the standards enunciated in *Haslip* is not the only flaw in the punitive award at issue here. Due to the dearth of guidance provided by the West Virginia punitive damages scheme, TXO simply had no notice that it could be ordered to pay $10 million for the newly recognized offense of slander of title as applied in this case. As such, the scheme is unconstitutionally vague.

A. The Procedure In This Case Was Fundamentally Unfair Under *Haslip* Because No Aspect Of The State Court Procedures Supplied The Requisite Check On Jury Discretion.

1. *The Jury Instructions Virtually Guaranteed That The Jury's Discretion Would Be Abused.*

In *Haslip*, this Court first reviewed the jury instructions in light of "general concerns of reasonableness and adequate guidance from the court." 111 S. Ct. at 1043.

The Court found that the instructions conveyed to the jury "the state policy concerns sought to be advanced." *Id.* at 1044. Significantly, the Court emphasized the fact that "[a]ny evidence of [the defendant's] wealth was excluded from the trial." *Id.* at 1043. Thus, although the jury had "significant discretion," *id.* at 1044, that discretion was "exercised within reasonable constraints," *id.*, and was not influenced by inappropriate information.

In this case, in contrast, not only was the jury left with "significant discretion," *id.*, but that discretion was tainted in a manner that the *Haslip* jury's discretion was not. The jury here was provided with more information than was the jury in *Haslip*. But far from serving to narrow and guide the jury's discretion, that "extra" information was highly prejudicial and inappropriate and it heightened the arbitrariness of the jury's punitive award. Most notably, the jury was specifically instructed to consider evidence of the wealth of TXO in deciding how much of a punitive award to enter. J.A. 34-35. Additionally, the jury was told that some undefined supplemental "compensation" was a goal of punitive damages. J.A. 34. Both of these elements could only tend to produce an oversized punitive award.

a. *Instructing The Jury That It Should Base The Amount Of Punitive Damages On The Wealth Of TXO And Its Corporate Affiliates Was Unconstitutional.*

"Due process may not require a detailed roadmap, but it certainly requires directions of some sort." *Haslip*, 111 S. Ct. at 1059 (O'Connor, J., dissenting). It should be common ground that the jury ought not be given a roadmap to the wrong destination, which is the "defendant['s] . . . deep pocket." *Id.* at 1045. Yet this is exactly where the TXO jury was directed. The jury here was specifically told that it should consider "the wealth of the perpetrator" because "to deter such conduct may require a larger fine upon one of large means than it would upon

one of ordinary means." See J.A. 34-35.[36] In *two* separate closing arguments for respondents, the jury was repeatedly told the net assets of TXO and its corporate affiliates, and was encouraged to derive a punitive damages figure based solely on those numbers. See Appendix D & Appendix E. Because the size of the punitive damages award was directly related to the *only* concrete guidance given to the jury, the inference is inescapable that the wealth portion of the instructions significantly affected the jury's verdict and thereby rendered the award unconstitutional.

Evidence of a defendant's financial condition is inherently prejudicial because it invites unjustified awards, a point courts and legislatures have recognized in many contexts. Thus, in holding that a municipality is immune from punitive damages under 42 U.S.C. § 1983, this Court noted that "evidence of a tortfeasor's wealth . . . may have a prejudicial impact on the jury [due to the unlimited taxing power of a municipality], in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981). See also *In re Paris Air Crash*, 622 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages [against a wealthy defendant] even when concrete elements of . . . intentional wrongdoing are absent"), *cert. denied*, 449 U.S. 976 (1980).

The potential for prejudice in the introduction of evidence of a defendant's wealth extends beyond unjustified

[36] The jury in this case was told that it should

> take into consideration all of the circumstances surrounding the particular occurrence, including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances which may operate to reduce the amount of the damages.

J.A. 34-35. The jury was given no referent—and certainly no numerical guide—as to any of these factors other than "wealth." Nor was any explanation provided as to what these factors may entail.

punitive awards; it may also contribute to biased determinations of liability. Thus, evidence of the wealth of a punitive damages defendant is prohibited altogether in Alabama, as this Court emphasized in *Haslip*. 111 S. Ct. at 1044. See *Ridout's-Brown Serv., Inc.* v. *Holloway*, 397 So.2d 125, 127 (Ala. 1981) (Jones, J., concurring) (Alabama does not permit evidence of the wealth of the defendant in punitive damages cases because such evidence "impermissibly impugns the fact finding process regarding liability"). Other States follow this rule, as well,[37] or have taken similar steps in recognition of this problem.[38] "It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

This emphasis on the "wealth of TXO" was not only highly prejudicial, its relevance to any legitimate state goal is highly questionable.[39] See *supra* notes 25 & 30. Over TXO's objection, respondents were permitted to pre-

[37] Kentucky also follows this course. *See Hensley* v. *Paul Miller Ford*, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974). In Colorado, evidence of the wealth of a punitive damages defendant is statutorily prohibited. Colo. Rev. Stat. § 13-21-102(6) (1992).

[38] Some States prohibit plaintiffs from presenting evidence of defendants' wealth until they have established a prima facie case that the prerequisites for a punitive damages award are present. *See, e.g.*, Or. Rev. Stat. § 30.925(2) (1991). *See also Farmy* v. *College Hous., Inc.*, 121 Cal. Rptr. 658, 670 (1975) (evidence of defendant's wealth may prejudice jury on compensatory damages issues). Other States prohibit discovery of the defendant's wealth until the jury has returned a special verdict on punitive damages. *See, e.g., Doralee Estates, Inc.* v. *Cities Serv. Oil Co.*, 569 F.2d 716, 723 n.9 (2d Cir. 1977) (applying New York law). In still others, it is reversible error to present evidence of defendant's financial condition where it is determined that there was not sufficient evidence for the awarding of punitive damages. *Feld* v. *Merriam*, 485 A.2d 742, 748 (Pa. 1984); *Berkeley Pump Co.* v. *Reed-Joseph Land Co.*, 653 S.W.2d 128, 138 (Ark. 1983).

[39] With respect to the goal of deterrence, for example, as noted above, deterrence theory directs consideration of the expected benefits of conduct, a calculation that turns on the potential profitability

sent to the jury evidence of the net assets of a 15-company division of USX, the corporation which acquired TXO after the acts in question had taken place.[40] Rec. 344-374. Such information did not serve either of West Virginia's stated goals for punitive damages. Rather, it eliminated any ability of the jury instructions reasonably to constrain the jury's discretion.

b. ***Permitting The Jury To Enhance Its Punitive Award Based On A Principle Of Unlimited And Standardless "Compensation" Served Merely To Add An Element Of Arbitrariness To The Award.***

The jury also was instructed that punitive damages may be awarded "to provide additional compensation for the conduct to which the injured parties have been subjected." J.A. 34. Because the jury had already been instructed on how to determine compensatory damages, see J.A. 23-24, 26, this instruction was nothing less than an open-ended invitation for the jury to act on its emotions and biases, and arbitrarily to redistribute wealth from an out-of-state corporation to resident litigants. The jury was given no objective method by which to calculate the amount of this "bonus" compensation, other than by ref-

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of the course of proscribed conduct, and is the same regardless of the "wealth" of defendant. The jury here received no information from which it could determine this potential profitability, and thus it was left wholly without guidance in calculating how much it would take to deter TXO (or USX, or any defendant, for that matter) from engaging in such conduct in the future. Similarly, with respect to the goal of retribution, the jury received no information—such as the amounts of other awards or of legislatively determined fines for similar conduct—that would aid them in calculating the amount appropriate to punish TXO.

[40] Thus, the jury was permitted to consider the assets of 14 companies that clearly were not responsible for the acts at issue. And the West Virginia Supreme Court, in affirming the award and the admission of this evidence, indicated that it would be appropriate to look *beyond* even the corporate affiliates of TXO to USX itself in determining the amount of the punitive award. Pet. App. 42a.

erence to the wealth of the defendant. Redistribution of wealth is not a stated goal of punitive damages in West Virginia, see *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 906 (W. Va. 1991) (criticizing juries' tendency to try to "redistribute wealth from without the state to within"), and if it were, it would surely be constitutionally suspect. *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330, 350 (1935). Yet the message given to the jury by this unexplained compensation instruction was that it should feel free to play the role of social architect to whatever extent it wished. It is difficult to imagine a jury instruction that offers a more hospitable invitation to arbitrariness, and the West Virginia jury obviously accepted that invitation.

2. ***TXO Did Not Receive The Benefit Of Meaningful Judicial Review At Either The Trial-Court Or Appellate Level.***

The Alabama procedure at issue in *Haslip* provided for two layers of judicial review of a punitive damages award to "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. This Court in *Haslip* recognized that the Alabama procedure, which furnished courts with objective factors to inform their analysis, ensured that the mandated state-court review would conform to consistent and objective standards, and was not merely an expression of a judge's predilections and biases. In this case, the prejudicial nature of the jury instructions and the shockingly high ratio of punitive to compensatory damages surely called for exacting judicial scrutiny. Yet no meaningful review was conducted, and certainly not a careful, two-level review of the award under established criteria of the type approved by this Court in *Haslip*. To the contrary, the punitive award ultimately was affirmed by the West Virginia Supreme Court based solely on that court's contentless determination that TXO had been "really mean."

a. *The Trial Court's Review Was Unguided By Preestablished Criteria, And Its Summary Disposition Rendered The Court's Decision Unreviewable.*

In Alabama, both the trial court and the appellate court apply seven criteria to determine coherently "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Haslip*, 111 S. Ct. at 1405. As described by this Court, these criteria are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. (citations omitted). When applying these criteria to punitive awards, trial courts in Alabama are required "to reflect in the record the reasons" for the action they choose to take or refrain from taking. 111 S. Ct. at 1044.

In this case, by contrast, no uniform standards had been promulgated by either the West Virginia courts or legislature to guide the trial court's review. Contrast *id.* ("Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards"). Unlike the trial court in *Haslip*, the trial court here was not required to make

findings on the record, and it made none. Rather, in stark contrast to the approach approved in *Haslip*, the trial court summarily denied TXO's post-trial motions from the bench. Pet. App. 74a. The absence of any meaningful post-verdict review on the record deprived TXO of this vital layer of due process protection.

b. *The West Virginia Supreme Court's Review Was Standardless And Subjective.*

Importantly, under Alabama's punitive damages scheme as approved in *Haslip*, the appellate review process begins with a comparative analysis. 111 S. Ct. at 1045. By taking into account other punitive awards made and legislatively determined fines for similar conduct, the reviewing court can establish a baseline for determining whether the award is "grossly out of proportion to the severity of the offense." *Id.* After its comparative analysis, the Alabama appellate court then performs a second review of established criteria for evaluating the punitive damages, and this analysis is conducted with the benefit of the trial court's recorded findings. *Id.*

In this case, the West Virginia Supreme Court conducted no comparative analysis. As previously demonstrated, such an analysis would have revealed that both the ratio of punitive to compensatory damages and the absolute dollar amount of the $10 million award against TXO represented extreme departures from the current and historical norms.[41] See Appendix A & Appendix B. Nor did the West Virginia Supreme Court apply "detailed substantive standards" to the award. 111 S. Ct.

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[41] TXO does not suggest that the amounts of previous awards under similar circumstances form absolute limits to any given punitive award, but rather, that a court should scrutinize out-of-the-ordinary punitive awards with particular care to ascertain whether they are reasonably limited to furthering the State's goals. *See* Wheeler, *supra* note 30, at 953 (suggesting that "there should be a rebuttable presumption that any punitive damages award more than twice the size of the compensatory award in a product liability case is excessive").

at 1045. Instead, it determined that the punitive award was not excessive based on its subjective determination that TXO had been "really mean." Pet. App. 40a.

The "really mean"/"really stupid" standard of review is, if anything, even less meaningful than the standards used in Vermont and Mississippi, which have evoked expressions of concern from this Court. See *Haslip*, 111 S. Ct. at 1045 n.10. West Virginia invites trial and appellate courts to give expression to their subjective views and personal predilections by assigning to a defendant's acts a label of either "really mean" or "really stupid"—emotion-laden words which are not "well-founded in our tort law . . . [and] upon which attorneys and judges have [not] traditionally relied." *TXO*, Pet. App. 54a (McHugh, C.J., concurring separately.) This is an endeavor certain to result in arbitrary decisions wholly at odds with due process. This essentially standardless review cannot be said to provide "an additional check on the jury's or trial court's discretion," 111 S. Ct. at 1045, neither of which was checked in this case, in any event.[42]

The application of the "really mean"/"really stupid" test also was too driven by and too dependent upon the jury's verdict to constitute the kind of "meaningful constraint on the discretion of . . . fact finders" emphasized by this Court in *Haslip*. *Id.* Under the "really mean"/"really stupid" test, the large size of the award itself formed the basis for the court's conclusion that TXO must have been "really mean." Pet. App. 40a

[42] Indeed, under West Virginia's new standard, any time the defendant is classified as "really mean," there is no limit on punitive damages. On the other hand, it is questionable whether punitive damages can *ever* be awarded in West Virginia if the tortfeasor is merely stupid. Under West Virginia law, punitive damages may only be awarded "[i]n actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear . . . ." Pet. App. 53a (citations and internal quotes omitted).

("As for the reprehensibility of TXO's conduct, . . . we believe the jury's verdict says more than we could say in an opinion twice this length"). This sort of bootstrap reasoning constitutes slavish deference to the jury's determination, not "meaningful review."

In sum, unlike the petitioner in *Haslip*, TXO did not receive three levels of careful scrutiny of the punitive damages award. To the contrary, TXO did not receive adequate scrutiny of the award imposed upon it at any level—jury, trial court, or appellate court. Thus, no matter what this Court in *Haslip* intended as the procedural bare minimum for satisfying the Fourteenth Amendment before punitive damages can be assessed against a tortfeasor, the procedures followed in West Virginia in this case were inadequate. Accordingly, the punitive award is unconstitutional and must be set aside.[43]

B. The Procedure Applied In This Case Was Unconstitutionally Vague.

The heart of the vagueness doctrine is concern for evenhandedness and regularity in the administration of

[43] The Court in *Haslip* balanced the interests of the petitioner and the interests of Alabama in determining that the procedure afforded in that State was constitutionally adequate. *See* 111 S. Ct. at 1044 ("These [jury] instructions, we believe, reasonably accommodated [the petitioner's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution"); *cf. Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (setting forth three-part balancing test for determining the degree of procedural protection required when the government acts to deprive an individual of a protected interest). Here, under such a balancing inquiry, the balance tips demonstrably in TXO's favor. The jury discretion in this case, unchecked by either careful guidance or meaningful judicial review, creates an enormous risk that a defendant deemed to be "really mean" by the size of the jury verdict will face a limitless monetary penalty, *see* Pet. App. 39a, when a much smaller penalty would still effectively serve the State's purposes. West Virginia, on the other hand, has no countervailing interest in avoiding such procedures; it has already unequivocally recognized that additional punitive damages procedures are warranted. *Garnes*, 413 S.E.2d at 908-910.

justice. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"). The vagueness doctrine also derives from a related principle that people must be given fair warning—"actual notice"—of the consequences of their actions." *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983). Thus, it has been settled for 180 years that a prosecution cannot go forward unless the legislature "first make[s] an act a crime [and] *affix[es] a punishment* to it." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 31, 34 (1812) (emphasis added).[45] Here, punitive damages were awarded against TXO in the absence of "explicit standards" at any level of the proceedings, and TXO had no notice whatsoever that it could be subjected to a $10 million award as a result of the type of conduct at issue here. Moreover, there is every reason for reviewing the vagueness of West Virginia's standards for imposing punitive damages in a searching light at least comparable to that used to examine penal standards.[46] Under any meaningful standard of clarity, however, the system here must be found wanting.

[44] Predictability is a necessary condition for punishment to achieve its goal of measured deterrence. *See* J. Bentham, *The Rationale of Punishment* 41 (1983); 4 W. Blackstone, *Commentaries on the Laws of England* 17 (1st ed. 1769).

[45] The fact that these "quasi-criminal" punitive damages are awarded in civil cases is no bar to the application of the vagueness doctrine. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). Thus, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down on vagueness grounds a Pennsylvania statute that authorized a jury, at its discretion and unguided by any clear standards, to impose the costs of a criminal prosecution on an acquitted defendant. The Court stated that whether the statute should be classified as civil or criminal was irrelevant to the vagueness analysis:

> Whatever label has been given to the [Pennsylvania statute], there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property . . . Implicit in [the Due Process Clause] is the premise that the law must be one that carries an understandable meaning with legal standards that courts must accept.

Id. at 402-03.

1. *The Procedures Followed By The Courts Below Undermined Each Of The Core Values Served By The Void-For-Vagueness Doctrine Embodied In The Due Process Clause.*

The void-for-vagueness doctrine seeks to further several related constitutionally mandated goals: to ensure that laws are sufficiently understandable to provide adequate notice of potential penalties, *Grayned*, 455 U.S. at 358; to establish clear guidelines, preventing juries from merely "pursu[ing] their personal predilections" and "caprice," *Kolender*, 461 U.S. at 98; *Roberts* v. *United States Jaycees*, 478 U.S. 609, 629 (1984); and to permit "meaningful judicial review." *Roberts*, 478 U.S. at 629. In this case, it is clear that each of these requirements was violated by West Virginia's vague punitive damages scheme.

The jury instructions contained a broad invitation to award a random windfall to respondents as some undefined "compensation," J.A. 34, and they directed the jury to consider prejudicial and irrelevant information. See *supra* pp. 34-38. No established criteria guided either the trial court's or the appellate court's review of the punitive award. See, *e.g.*, *Roberts*, 478 U.S. at 629-30 (in finding that Minnesota's Human Rights Act

[46] This Court has indicated that criminal statutes require a higher degree of clarity to avoid being unconstitutionally vague than do statutes providing for civil penalties. *Village of Hoffman*, 455 U.S. at 498-99. *See also Garner* v. *White*, 726 F.2d 1274, 1278 (8th Cir. 1984) (state paraphernalia statutes subjected to stricter vagueness test than other business-oriented statutes due to imposition of criminal liability). Punitive damages are routinely characterized as "quasi-criminal," *Haslip*, 111 S. Ct. at 1043, or "penal." *See Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 298 (1989) (O'Connor, J., dissenting); *Smith* v. *Wade*, 461 U.S. 30, 86 (1983) (Rehnquist, J., dissenting).

was not unconstitutionally vague as applied, Court emphasized the Minnesota Supreme Court's use of "a number of specific and objective criteria . . . typically employed in [such cases] . . . . [T]hese familiar standards ensure[] that the reach of the statute is readily ascertainable"). See *supra* pp. 39-43. The West Virginia Supreme Court's review consisted of a patently subjective and vague determination of whether TXO had been "really mean" or "really stupid"—hardly a standard that provides any notice whatsoever to persons attempting to conform their conduct to the requirements of the law, and certainly not an approach that places any meaningful constraint on punitive awards. See *supra* pp. 41-43. This system devoid of "understandable meaning" or "legal standards" that courts must accept," *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403 (1966), is "a textbook example of the void-for-vagueness doctrine," *Haslip*, 111 S. Ct. at 1058 (O'Connor, J., dissenting), irrespective of whether it is examined with reference to the more stringent test of clarity demanded in the penal context, or a less strict standard.[47]

[47] The Court in *Haslip* rejected a void-for-vagueness argument put forward by the petitioner concerning that specific award. 111 S. Ct. at 1047 n.12. The sparse treatment of the issue did not, however, broadly reject such claims in other settings. Specifically, the Court observed that vagueness problems are more serious with respect to what conduct is a violation of law than with respect to what penalty attaches to a violation. *Id.* (distinguishing *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966)). In *Haslip*, of course, there was no question that the fraud at issue violated both Alabama's civil and criminal laws. Moreover, the punitive award was within a range of awards previously upheld for similar conduct. Accordingly, the notice argument was not well presented by the facts of *Haslip*, as is reflected in the amount of attention the claim received by this Court.

Here, by contrast, slander of title had never been explicitly recognized as a tort in West Virginia, and certainly slander of title without a finding of actual damage to title or actual malice had never been deemed an appropriate basis for any award, much less a punitive award. In addition, no reasonably intelligent person in any State could conceivably have anticipated that a proper punishment for slander of title could reach the level of $10 million for a single infraction. Unless this Court rejects its prior decisions indicating that the magnitude of the punishment is a component of the notice required by due process (*see, e.g., United States* v. *Batchelder*, 442 U.S. 114 (1979)), then the void-for-vagueness doctrine must have some vitality as applied to this case. If so, the punitive award here violates due process. Indeed, each evil sought to be avoided by the vagueness doctrine was realized in this case. *See Bankers Life & Casualty Co.* v. *Crenshaw*, 108 S. Ct. 1645, 1656 (1988) (O'Connor, J., concurring in judgment) ("[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

2. *TXO Had No Notice That It Could Be Assessed $10 Million In Punitive Damages Under A Cause Of Action Never Previously Recognized In West Virginia.*

TXO had no notice in 1985—when the events at issue in this lawsuit transpired—that it could be liable for a multi-million-dollar punitive damage award if it chose to bring a quiet-title action to settle a business dispute.[48] Neither statute nor common law provided guidance or advance notice as to the potential for punitive damages of $10 million. As noted above, the largest punitive damages award ever affirmed by the West Virginia Supreme Court up until that date was $500,000. See Appendix A. Accordingly, TXO had no notice in 1985 that it could find itself liable for a punitive damage award over 20 times as large as any award ever affirmed prior to that time. See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) ("Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages it could expect to incur a $1.6 million punitive damages award"). Nor could TXO have anticipated that a

[48] Any belief that companies doing business in West Virginia today have such notice is illusory. Notice that conduct might subject someone to punitive damages of anywhere from $1 to $10 million is no notice at all; a "person of ordinary intelligence" will be unable to use that notice as a guide to the conduct of his affairs. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

punitive-to-compensatory ratio of 526, more than 50 times as large as any previous ratio that had been upheld, see *supra* p. 20, would be approved solely on the basis of a *post hoc* determination that TXO was "really mean."

The lack of any notice to TXO that it might be assessed $10 million is particularly flagrant in light of the fact that this case represents the first time the tort of slander of title had been recognized in West Virginia. *Cf. Waits* v. *Frito Lay, Inc.*, 978 F.2d 1093, 1105 (9th Cir. 1992) (punitive damages approved based in part on fact that the tort constituting the underlying cause of action was well established), *cert. denied*, No. 92-863, 1992 WL 353533 (U.S. Jan. 19, 1993). Moreover, in every other jurisdiction that has awarded punitive damages for the tort of slander of title, actual damages to title and *actual* malice have both been required. See Rec. 1500-1503, 1504-1506. The trial court did not require either of these elements to be proved, see J.A. 27 (TXO's proposed jury instruction no. 3) & J.A. 29 (TXO's proposed jury instruction no. 7), and the West Virginia Supreme Court affirmed. Pet. App. 20a. Even if the tort of slander of title had been predictable in West Virginia, the action of the trial court and the West Virginia Supreme Court in unexpectedly changing the elements of the tort, and then imposing a multi-million-dollar award for committing that "tort," was violative of due process. *Cf. Rabe* v. *Washington*, 405 U.S. 313 (1972).

At the end of the day, the procedure here suffered from the lack of appropriate jury guidance, the complete absence of any defined standards on review, the West Virginia Supreme Court's declaration of a new, wholly standardless "really mean"/"really stupid" test, a newly defined tort, and the greatly increased size and ratio of the punitive award. The combination of these factors made it impossible for TXO to anticipate this penalty, and thereby rendered the award void for failing to provide notice necessary to satisfy due process.

* * * *

Very simply, what this case presents is a jury that has acted not in implementation of any state purpose, but solely out of bias and prejudice, and a state court system that has refused to apply established constitutional protections against such jury conduct. The product of that system is a grossly excessive penalty that deprived TXO of its property without due process of law.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals upholding the award of punitive damages should be reversed.

Respectfully submitted,

RICHARD L. HORSTMAN
MARATHON OIL COMPANY
7301 NW Expressway
Oklahoma City, OK 73132

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
DAVID L. LAWSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

January 22, 1993

* Counsel of Record

APPENDICES

ADDENDUM

APPENDIX A

WEST VIRGINIA PUNITIVE DAMAGES AWARDS

PUNITIVE AWARDS AFFIRMED ON APPEAL

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
Riddle v. *McGinnis*, 22 W. Va. 253 (1883)	Trespass on the case.	$3,000 [$43,714.26] [1]	—	N/A
Mayor v. *Frobe*, 22 S.E. 58 58 (W. Va. 1895)	Unlawful sales of intoxicating liquors injuring wife in her means of support.	$750 [$12,240]	—	N/A
Scott v. *Chesapeake & O. R.R.*, 27 S.E. 211 (W. Va. 1897)	Willfully and wantonly refusing to allow plaintiff to return valid ticket.	$250 [$4,080]	—	N/A
Davis v. *Chesapeake & O. Ry.*, 56 S.E. 400 (W. Va. 1907)	Trespass on the case.	$900 [$13,114.28]	—	N/A
Turk v. *Norfolk & W. Ry.*, 84 S.E. 569 (W. Va. 1915)	Assault; unlawful arrest and imprisonment.	$1,000 [$13,421.05]	$500 [$6,710.53]	2:1

[1] The figures in brackets represent the amount of the award as measured in 1991 dollars. The source for the 1991 dollar equivalents for awards granted between 1960 and 1991 was: U.S. Bureau of Labor Statistics, "Consumer Price Indexes by Major Groups: 1960-1991," in *Statistical Abstract of the United States: 1992* 469 (U.S. Bureau of the Census 1992). The Bureau of Labor Statistics Office of Prices and Living Conditions provided the 1991 dollar equivalents for the other awards, using official Consumer Price Index figures for awards granted between 1913 and 1959, and unofficial Bureau of Labor Statistics calculations for pre-1913 awards.

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
Addair v. *Huffman*, 195 S.E.2d 739 (W. Va. 1973)	Wrongful execution of wages.	$1,500 [$4,601]	$250 [$767]	6:1
Leach v. *Biscayne Oil and Gas Co.*, 289 S.E.2d 197 (W. Va. 1982)	Trespass; damage to property.	$41,800 [$58,996]	—	N/A
Wells v. *Smith*, 297 S.E.2d 872 (W. Va. 1982)	Civil action to recover damages resulting from theft.	$10,000 [$14,113]	—	N/A
Mutafis v. *Erie Ins. Exchange*, 561 F. Supp. 192 (N.D. W. Va. 1983), aff'd, 775 F.2d 593 (4th Cir. 1985)	Violation of the West Virginia Unfair Trade Practices Act.	$20,000 [$27,349]	$15,000 [$20,563]	1.33:1
Painter v. *Raines Lincoln Mercury, Inc.*, 323 S.E.2d 596 (W. Va. 1984)	Fraudulent inducement to purchase property.	$9,200 [$12,060]	$1,200 [$1,574]	7.66:1
Bell v. *Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W. Va.), *cert. denied*, 474 U.S. 936 (1985)	Willful failure of insurance company to satisfy judgment against insured.	$25,000 [$31,645]	$53,491.85 [$68,793]	.46:1
McClung v. *Marion County Comm'n*, 360 S.E.2d 221 (W. Va. 1987)	Violation of state overtime wage statute; denial of procedural due process; retaliatory discharge.	$35,000 [$41,963]	$40,000 [$47,685]	.88:1
Muzelak v. *King Chevrolet, Inc.*, 368 S.E.2d 710 (W. Va. 1988)	Common law material misrepresentation.	$25,000 [$28,782]	$15,000 [$19,188]	1.66:1
Berry v. *Nationwide Mut. Fire Ins. Co.*, 381 S.E.2d 367 (W. Va. 1989)	Willful and malicious failure to pay claim under insurance policy.	$500,000 [$549,193]	$125,000 [$137,298]	4:1
Jones v. *Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694 (W. Va. 1990)	Claim under Fair Credit Reporting Act for incorrect reporting of business' credit-worthiness.	$42,500 [$44,288]	$4,000 [$4,170]	10.62:1
Goodwin v. *Thomas*, 403 S.E.2d 13 (W. Va. 1991)	Breach of contract and tortious destruction of property.	$25,000	$17,858.84	1.39:1
Jarvis v. *Modern Woodmen of Am.*, 406 S.E.2d 736 (W. Va. 1991)	Breach of duty to prepare accurately plaintiff's life insurance policy.	$500,000	$125,000	4:1
C.W. Development, Inc. v. *Structures, Inc. of W. Va.*, 408 S.E.2d 41 (W. Va. 1991)	Intentional interference with employment relationship.	$75,000	$24,154.30	3.1:1
Pote v. *Jarrell*, 412 S.E.2d 770 (W. Va. 1991)	Malicious prosecution and abuse of process.	$35,000	$12,000	2.9:1
Casillas v. *Tuscarora Land Co.*, 412 S.E.2d 792 (W. Va. 1991)	Common law negligence and fraud.	$200,000	$88,189	2.26:1
Hinerman v. *The Daily Gazette Co.*, 1992 WL 166350 (W. Va. July 15), *petition for cert. filed* Dec. 9, 1992	Libel.	$300,000	$75,000	4:1
Davis v. *Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992)	Asbestos-related injury.	$40,000	$66,000	.60:1

PUNITIVE AWARDS REVERSED ON APPEAL

Case	Cause Of Action	Punitive Damages	Actual Damages	Ratio
George v. *Norfolk & W. Ry.*, 92 S.E. 430 (W. Va. 1917)	False imprisonment.	$3,000 [$31,875]	—	N/A
Hess v. *Marinari*, 94 S.E. 968 (W. Va. 1918)	Assault.	$9,000 [$81,419.04]	—	N/A
Toler v. *Cassinelli*, 41 S.E.2d 672 (W. Va. 1947)	Action to recover damages suffered when landlord locked lessee out of apartment.	$1,000 [$6,250]	—	N/A
Ennis v. *Brawley*, 41 S.E.2d 680 (W. Va. 1947)	Assault.	$3,000 [$18,750]	$1 [$6.25]	3,000:1
Sprouse v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W. Va.), *cert. denied*, 423 U.S. 882 (1975)	Libel.	$500,000 [$1,265,000]	$250,000 [$632,500]	2:1
Shamblin's Ready Mix, Inc. v. *Eaton Corp.*, 873 F.2d 736 (4th Cir. 1989)	Conversion.	$650,000 [$714,246]	$3,531 [$3,880]	184.08:1
Tasker v. *Moore*, 738 F.Supp. 1005 (S.D. W. Va. 1990)	Civil rights action against former Commissioner of Department of Corrections.	$200,000 [$208,482]	$32,500 [$33,878.33]	6.15:1
Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991)	Nuisance.	$105,000	—	N/A

APPENDIX B

PUNITIVE DAMAGES AWARDS FOR SLANDER OF TITLE AFFIRMED ON APPEAL

Case	Punitive Damages	Actual Damages	Ratio
Hopkins v. *Drowne*, 41 A. 567 (R.I. 1898)	$1,300 [$22,074][1]	$3,700 [$63,068]	.35:1
Lacroix v. *Villio*, 49 So. 20 (La. 1909)	$869.08 [$13,670]	$130.92 [$2,062]	6.63:1
Lynch v. *Kemp*, 49 P.2d 817 (Cal. 1935)	$250 [$2,582]	$500 [$5,165]	.50:1
Winn v. *Warner*, 193 S.W.2d 867 (Tex. Ct. Civ. App.), *rev'd*, 197 S.W.2d 338 (Tex. 1946), *on remand*, 199 S.W.2d 560 (Tex. Ct. Civ. App. 1947)	$11,500 [$72,910]	$23,000 [$145,820]	.50:1
Olsen v. *Kidman*, 235 P.2d 510 (Utah 1951)	$10 [$54.50]	—	N/A

[1] The figures in brackets represent the amount of the award as measured in 1991 dollars. The source for the 1991 dollar equivalents for awards granted between 1960 and 1991 was: U.S. Bureau of Labor Statistics, "Consumer Price Indexes by Major Groups: 1960-1991," in *Statistical Abstract of the United States: 1992* 469 (U.S. Bureau of the Census 1992). The Bureau of Labor Statistics Office of Prices and Living Conditions provided the 1991 dollar equivalents for the other awards, using official Consumer Price Index figures for awards granted between 1913 and 1959, and unofficial Bureau of Labor Statistics calculations for pre-1913 awards.

Case	Punitive Damages	Actual Damages	Ratio
Spencer v. *Harmon Enterprises, Inc.*, 44 Cal. Rptr. 683 (Cal. Dist. Ct. App. 1965)	$5,000 [$21,619]	$22,000 [$95,123]	.22:1
Glass v. *Gulf Oil Corp.*, 96 Cal. Rptr. 902 (Cal. Ct. App. 1970)	$6,500 [$22,817]	$5,000 [$17,551]	1.3:1
Glusman v. *Lieberman*, 285 So.2d 29 (Fla. Dist. Ct. App. 1973)	$2,500 [$7,668]	$6,611.20 [$20,280]	.37:1
Misco Leasing, Inc. v. *Keller*, 490 F.2d 545 (10th Cir. 1974)	$10,000 [$27,626]	$6,572 [$18,156]	1.52:1
Jumping Rainbow Ranch v. *Conklin*, 538 P.2d 1027 (Mont. 1975)	$1,000 [$2,531]	$4,000 [$10,126]	.25:1
Johnson v. *Doran*, 540 P.2d 306 (Mont. 1975)	$43,500 [$110,124]	$16,772 [$42,460]	2.59:1
Johnson v. *Ervin*, 225 S.E.2d 21 (Ga. 1976)	$150 [$359]	$250 [$598]	.60:1
Walker v. *Ruggles*, 540 S.W.2d 470 (Tex. Ct. Civ. App. 1976)	$1,500 [$3,590]	$2,000 [$4,787]	.75:1
Builders Equity Corp. v. *Hurwitz*, 530 F.2d 1072 (D.C. Cir. 1976)	$100 [$239]	$121,838.57 [$299,209]	.0008:1
Proctor v. *Gissendaner*, 579 F.2d 876 (5th iCr. 1978)	$31,560 [$65,927]	$8,440 [$17,675]	3.73:1

American Nat. Bank & Trust Co. v. *First Wis. Mortgage Trust*, 577 S.W.2d 312 (Tex. Ct. Civ. App. 1979)	$50,000 [$93,801]	$60,000 [$113,014]	.83:1
Dixon v. *Process Corp.*, 416 A.2d 1295 (Md. Ct. Spec. App. 1980)	$21,000 [$34,711]	—	N/A
Harper v. *Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980)	$2,500 [$4,132]	$385 [$637]	6.49:1
Martin-Trigona v. *Gouletas*, 634 F.2d 354, 356 n.4 (7th Cir.), *cert. denied*, 449 U.S. 1025 (1980) (describing earlier order)	$125,000 [$206,614]	$75,000 [$124,466]	1.66:1
Montgomery Properties v. *Economy Forms*, 305 N.W.2d 470 (Iowa 1981)	$36,000 [$53,940]	$18,644 [$27,948]	1.93:1
Zehner v. *Post Oak Oil Co.*, 640 P.2d 991 (Okla. Ct. App. 1981)	$17,900 [$26,820]	$6,400 [$9,613]	2.79:1
McDonald v. *Bennett*, 674 F.2d 1080 (5th Cir. 1982)	$300,000 [$423,419]	$98,905 [$139,594]	3.03:1
Display Fixtures Co. v. *R.L. Hatcher, Inc.*, 438 N.E.2d 26 (Ind. Ct. App. 1982)	$2,000 [$2,822]	$14,867.44 [$20,983]	.13:1
Summa Corp. v. *Greenspun*, 655 P.2d 513 (Nev. 1983)	$1,000,000 [$1,367,469]	—	N/A
M&I Bank of Westfield v. *Schaffrath*, 333 N.W.2d 733 (Wis. Ct. App. 1983) (unpublished opinion; text in Westlaw)	$1,000 [$1,368]	—	N/A
Soneff v. *Harlan*, 712 P.2d 1084 (Colo. Ct. App. 1986)	$800,000 [$994,160]	$90,358.02 [$112,288]	8.85:1

Case	Punitive Damages	Actual Damages	Ratio
City of Brady v. *Bennie*, 735 S.W.2d 275 (Tex. Ct. App. 1987)	$25,000 [$29,973]	$275,000 [$329,709]	.09:1
Castaic Clay Mfg. Co. v. *Dedes*, 240 Cal. Rptr. 652 (Cal. Ct. App. 1987)	$200,000 [$239,788]	$500,000 [$599,471]	.40:1
Hagan v. *Liberty Loan Corp.*, 423 N.W.2d 886 (Iowa Ct. App. 1988)	$32,000 [$36,842]	$32,000 [$36,842]	1:1
Williams v. *Jennings*, 755 S.W.2d 874 (Tex. Ct. App. 1988)	$65,000 [$74,835]	$23,075 [$26,566]	2.81:1
DeLeo v. *Anthony A. Nunes, Inc.*, 546 A.2d 1344 (R.I. 1988), *cert. denied*, 489 U.S. 1074 (1989).	$30,000 [$34,539] $7,000 [$8,509]	$89,421 [$102,951] $3,000 [$3,454]	.33:1 2.33:1
Peckham v. *Hirschfeld*, 570 A.2d 663 (R.I. 1990)	$25,000 [$26,052]	$21,664.72 [$22,576]	1.15:1
Peters Well Drilling Co. v. *Hanzula*, 575 A.2d 1375 (N.J. Super. Ct. App. Div. 1990)	$1,000 [$1,042]	$1,794.12 [$1,869]	.55:1
Bright v. *Gass*, 831 S.W.2d 149 (Ark. Ct. App. 1992)	$1,000	$2,075	.48:1
Tarrant Bank v. *Miller*, 833 S.W.2d 666 (Tex. Ct. App. 1992)	$10,000	$7,086.50	1.41:1

APPENDIX C

SELECTED STATE STATUTES PLACING LIMITATIONS ON PUNITIVE DAMAGES AWARDS

Category	State	Amount	Description	Cite
Real Property Related Actions	Alabama	Double damages	destruction of timber	Ala. Code § 9-13-62 (1987)
	California	Treble damages	waste	Cal. Civ. Proc. Code § 732 (Deering 1983)
		Treble damages	trespass to cut down or carry away trees or timber	Cal. Civ. Proc. Code § 733 (Deering 1983)
		Treble damages	wrongful injury to trees, timber, or underwood on land of another	Cal. Civ. Code § 3346 (Deering 1984)
		Treble damages	unlawful forcible entry	Cal. Civ. Proc. Code § 735 (Deering 1983)
	Colorado	Treble damages	violation of orders as to waste, diversions, and distribution of water	Colo. Rev. Stat. § 37-92-504 (1990)
	Illinois	Value of property	property owner subject to conservation right may be liable	Ill. Ann. Stat. ch. 30, para. 404 (Smith-Hurd Supp. 1992)

Category	State	Amount	Description	Cite
Real Property Related Actions (cont'd)	Illinois (cont'd)	Treble damages	cutting of timber or trees	Ill. Ann. Stat. ch. 96½, para. 9402 (Smith-Hurd Supp. 1992)
	Massachusetts	Treble damages	waste	Mass. Gen. Laws Ann. ch. 242 §§ 4, 6 (West 1988)
		Treble damages	willful cutting of trees on another's land	Mass. Gen. Laws Ann. ch. 242 § 7 (West 1988)
		Treble damages	unauthorized taking of shellfish	Mass. Gen. Laws Ann. ch. 130 § 63 (West 1991)
	Minnesota	Treble damages	waste	Minn. Stat. Ann. § 561.17 (West 1988)
		Treble damages	cutting down or carrying off wood or timber from another's property	Minn. Stat. Ann. § 561.04 (West Supp. 1993)
		Treble damages if voluntary or double damages if involuntary	violation of law against timber trespass on state lands	Minn. Stat. Ann. § 90.301 (West 1977 and Supp. 1992)
		Treble damages	failure of owner of animals to distrain them	Minn. Stat. Ann. § 561.09 (West 1988)
		Treble damages	permitting herd animals to run at large	Minn. Stat. Ann. § 346.16 (West 1990)

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		Treble damages	forcible eviction	Minn. Stat. Ann. § 557.08 (West 1988)
		Treble damages	forcible entry	Minn. Stat. Ann. § 557.09 (West 1988)
	New Jersey	Treble damages	waste	N.J. Stat. Ann. §§ 2A:65-1, 3, 5, 6 (West 1987)
	New York	Treble damages	cutting down or carrying off trees or timber from another's property	N.Y. Real Prop. Acts Law § 861 (McKinney 1979)
		$10 per tree or treble damages or both	cutting down trees on state land	N.Y. Envtl. Conserv. Law § 71-0703 (McKinney 1984)
		Treble damages	forcible eviction	N.Y. Real Prop. Acts Law § 853 (McKinney Supp. 1993)
	Virginia	Double damages	waste	Va. Code Ann. § 55-214 (Michie 1950)
		Treble damages	waste during pendency of suit to recover or charge land	Va. Code Ann. § 55-216 (Michie 1950)
		Double damages	cutting timber from another's property	Va. Code Ann. § 55-333 (Michie 1950)

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Category	State	Amount	Description	Cite
Real Property Related Actions (cont'd)	Virginia (cont'd)	Treble damages	if trespasser who took timber fails to make payment required under § 55-333	Va. Code Ann. § 55-334 (Michie 1950)
		$20, and for each succeeding trespass, double damages	trespass by animals onto another's land	Va. Code Ann. § 55-306 (Michie 1950)
		Treble damages	willful injury or obstruction of property of a public service corporation	Va. Code Ann. § 56-5 (Michie 1950)
	West Virginia	Treble damages	waste	W. Va. Code § 37-7-4 (1985)
		Treble damages	waste during pendency of suit to recover or charge land	W. Va. Code § 37-7-5 (1985)
		Treble damages	injuring or carrying away trees or timber from another's land	W. Va. Code § 61-3-48a (Supp. 1992)

Personal Injury	Alabama	$400,000	medical malpractice	Ala. Code § 6-5-544 (Supp. 1992)
	Arizona	Not available	if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Ariz. Rev. Stat. Ann. § 12-701 (1992)
	California	Double damages	water company that fails to comply with regulations is liable to inhabitants	Cal. Publ. Util. Code § 8203 (Deering 1990)
	Colorado	$250,000	limitation on noneconomic damages in medical malpractice action	Colo. Rev. Stat. § 13-64-302 (Supp. 1992)
		Not available	against health care professional if injuries result from use of drug approved by any state or federal agency or used in accordance with standards of prudent health care practitioners or if injury was caused by acts of others unless he/she specifically ordered or ratified act	Colo. Rev. Stat. § 13-64-302.5 (Supp. 1992)
	Kansas	$100,000	limitation on noneconomic damages in wrongful death action	Kan. Stat. Ann. § 60-1903 (Supp. 1991)

Category	State	Amount	Description	Cite
Personal Injury (cont'd)	Kansas (cont'd)	Lesser of 25% annual gross income of defendant or $3 million	medical malpractice	Kan. Stat. Ann. § 60-3402 (Supp. 1991)
	Florida	Treble damages	contractor liable for injuries resulting from his negligence, malfeasance, or misfeasance	Fla. Stat. Ann. § 768.0425 (West Supp. 1992)
	Illinois	Not available	medical malpractice	Ill. Ann. Stat. ch. 110, para. 2-1115 (Smith-Hurd 1990)
		Treble damages	liability to state for failure to provide remedial action for release of hazardous substance	Ill. Ann. Stat. ch. 111½, para. 1022.2 (Smith-Hurd Supp. 1992)
	Massachusetts	Treble damages	unlawful discharge of substance injurious to public health or tending to contaminate shellfish	Mass. Gen. Laws Ann. ch. 130 § 927 (West 1991)
		Treble damages	liability of residential property owner for failure to correct dangerous conditions caused by high level of lead on premises	Mass. Gen. Laws Ann. ch. 111 § 199 (West Supp. 1992)

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Minnesota	$400 each employee		employer liable for violation of statute governing occupational safety and health	Minn. Stat. Ann. § 182.666 (West Supp. 1992)
New Jersey	Not available		if drug or food which caused harm was licensed and approved by Federal Food and Drug Administration	N.J. Stat. Ann. § 2A:58C-5 (West 1987)
Ohio	Not available		if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Ohio Rev. Code § 2307.80 (1991)
	$200,000		medical malpractice cases not involving death	Ohio Rev. Code § 2307.43 (1991)
Oregon	Not available		in product liability action unless proven that defendant showed wanton disregard for health and safety of others	Or. Rev. Stat. § 30.925 (1991)
	Not available		against health care practitioner unless practitioner's conduct was malicious	Or. Rev. Stat. § 18.550 (1991)

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Category	State	Amount	Description	Cite
Personal Injury (cont'd)	Oregon (cont'd)	Not available	if drug which caused harm was manufactured and labeled in acocrdance with Federal Food and Drug Administration regulations	Or. Rev. Stat. § 30.927 (1991)
	Rhode Island	Not available	survival action	R.I. Gen. Laws § 9-1-8 (1985)
	South Dakota	$1 million	medical malpractice	S.D. Codified Laws Ann. § 21-3-11 (1987)
	Utah	Not available	if drug which caused harm was manufactured and labeled in accordance with Federal Food and Drug Administration regulations	Utah Code Ann. § 78-18-2 (1992)
Claims Involving Fraud or Deceit	Arizona	Double damages	willful misappropriation of a trade secret	Ariz. Rev. Stat. Ann. § 44-403 (1992)
	California	Double damages	willful and malicious misappropriation of a trade secret	Cal. Civ. Code § 3426.3 (Deering Supp. 1993)
		Treble damages	if defendant sold device on which he altered identification mark, purchaser may recover	Cal. Civ. Code § 1710.1 (Deering Supp. 1993)
		Treble damages	if injury or damage caused because goods or services were provided by unlicensed persons when license required	Cal. Civ. Proc. Code § 1029.8 (Deering Supp. 1993)
		Treble damages	forgery of trust deed	Cal. Civ. Proc. Code § 749 (Deering Supp. 1993)
		$100 to $1,000 for each act	real property lessor's retaliatory act if done with oppression or malice	Cal. Civ. Code § 1942.5 (Deering 1981)
Colorado		Not to exceed actual damages	malicious and fraudulent misappropriation of a trade secret	Colo. Rev. Stat. § 7-74-104 (1986)
		Greater of treble damages or $250	deceptive trade practice	Colo. Rev. Stat. § 6-1-113 (1992)
Florida		Double damages	willful misappropriation of a trade secret	Fla. Stat. Ann. § 688.004 (West 1990)
		Difference between amount claimed by lienor and amount actually due	fraudulent mechanic's lien	Fla. Stat. Ann. § 713.31 (West 1988 and Supp. 1992)
Illinois		Lesser of treble damages or $500	issuing check and failing to pay after written demand	Ill. Ann. Stat. ch. 38, para. 17-1a (Smith-Hurd Supp. 1992)

Category	State	Amount	Description	Cite
Claims Involving Fraud or Deceit (cont'd)	Illinois (cont'd)	Treble damages	willful violation of Illinois antitrust act	Ill. Ann. Stat. ch. 38, para. 762 (Smith-Hurd Supp. 1992)
		Treble damages	injury to franchisee or motor vehicle dealer due to engagement of unfair method of competition or deceptive act	Ill. Ann. Stat., ch. 96½ para. 9402 (Smith-Hurd Supp. 1992)
	Massachusetts	Greater of treble damages or $1,000	deceptive or misleading advertising by a private business school	Mass. Gen. Laws Ann. ch. 75D § 14 (West Supp. 1992)
		Greater of treble damages or $1,000	tampering with odometer with intent to defraud	Mass. Gen. Laws Ann. ch. 266 § 141 (West 1990)
		Treble damages	sale of personal property by deceit or fraud	Mass. Gen. Laws Ann. ch. 231 § 85J (West 1985)
		Double damages	liability to the Commonwealth for fraudulent antitrust claim	Mass. Gen. Laws Ann. ch. § 21 (Law. Co-op. 1985)
		Treble damages	unfair competition or deceptive trade practice	Mass. Gen. Laws Ann. ch. 93A § 11 (Law. Co-op. 1985 and Supp. 1992)
		Double damages	theft of a trade secret	Mass. Gen. Laws Ann. ch. 93 § 42 (Law. Co-op. 1985)
		Treble damages	knowingly using name, picture or portrait of another without his consent for advertisting purposes	Mass. Gen. Laws Ann. ch. 214 § 13A (West 1989)
Minnesota		Double damages	willful and malicious misappropriation of a trade secret	Minn. Stat. Ann. § 325C.03 (West Supp. 1992)
		Treble damages	violation of laws governing restraint of trade	Minn. Stat. Ann. § 325D.57 (West Supp. 1992)
		Treble damages	vendor of medical care's liability to state for willfully submitting case report, rate application, or claim for reimbursement with a false representation	Minn. Stat. Ann. § 256B.121 (West 1992)
New Jersey		Treble damages	violations of New Jersey Antitrust Act	N.J. Stat. Ann. § 56:9-12 (West 1989)
		Treble damages	appropriation of name, brand, trademark, reputation or goodwill of another	N.J. Stat. Ann. § 56:4-2 (West 1989)
		Treble damages	violation of Consumer Fraud Act	N.J. Stat. Ann. § 56:8-19 (West 1989)

Category	State	Amount	Description	Cite
Claims Involving Fraud or Deceit (cont'd)	New Jersey (cont'd)	Treble damages	insurance company can recover against violator of fraud prevention statute	N.J. Stat. Ann. § 17:33A-7 (West 1985)
		Double damages	real estate broker or salesman's engagement in deceptive sales methods or diversion of funds	N.J. Stat. Ann. § 45:15-16.23 (West 1978)
	New York	Treble damages	corporation's use of false statements to obtain payments for social services from public funds	N.Y. Soc. Serv. Law § 145-b (McKinney Supp. 1993)
Civil Remedies for Crimes	Arizona	Treble damages	racketeering	Ariz. Rev. Stat. Ann. § 13-2314 (1992)
	California	Treble damages	receiving stolen property	Cal. Penal Code § 496 (Deering Supp. 1993)
	Colorado	Greater of treble damages or $200	theft, robbery, burglary	Colo. Rev. Stat. § 18-4-405 (Supp. 1992)
		Treble damages	violation of Organized Crime Control Act	Colo. Rev. Stat. § 18-17-106 (Supp. 1992)
		Treble damages	intimidation or retaliation of or against person for testimony about to be given or given at an official proceeding	Colo. Rev. Stat. § 18-8-708 (1986)
Florida	Treble damages	receiving stolen property	Fla. Stat. Ann. § 812.035 (West Supp. 1992)	
	Treble damages	racketeering	Fla. Stat. Ann. § 895.05 (West Supp. 1992)	
	Treble damages	misleading solicitation of money	Fla. Stat. Ann. § 817.061 (West 1976)	
	Treble damages	evincing prejudice during the commission of a crime	Fla. Stat. Ann. § 775.085 (West 1992)	
Illinois	Treble damages	financial exploitation of an elderly or disabled person	Ill. Ann. Stat. ch. 38, para. 16-1.3 (Smith-Hurd Supp. 1992)	
Minnesota	Treble damages	rustling or theft of livestock	Minn. Stat. Ann. § 609.551 (West 1987)	
	Greater of treble damages or $1,500	receiving stolen property	Minn. Stat. Ann. § 609.53 (West 1987)	

APPENDIX D

Excerpt from Closing Argument of Wade T. Watson, counsel for respondent Tug Fork Land Company

June 29, 1990

* * * *

[Tr. 757] His Honor has instructed you that you may award punitive damages and I've indicated to you what punitive damages amount to. Now, just consider the wealth of this corporation. A corporation TXO's size—one of the largest corporations. And the reason for putting in the evidence of Mr. Conrad on that point is that that's how a jury considers the amount of punitive damages. This is a multi-million dollar corporation—even [758] a billion dollars in assets. When you think about fining this defendant, a corporation of this magnitude and this size, ladies and gentlemen, what would it take to keep them from doing this again? It's gonna take a lot more than just awarding those attorney's fees. It's gonna take a lot more than that. This corporation, a multi-million dollar corporation, ought to be fined in terms of what they understand that goes to their resources; and their resources are in the millions. Therefore, think about that in terms of assessing a punitive damage award against them. A million, twelve million dollars. Those kinds of numbers are not out of line when you talk about a corporation that has assets of something like a billion dollars.

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APPENDIX E

Excerpt from Closing Argument of G. David Brumfield, counsel for respondents Alliance Resources Corp., George King, and Grover Goode

June 29, 1990

* * * *

[Tr. 779] I—Okay. Now, what about punitive damages? The Judge has said for purposes to deter this company from doing this again and to punish it. And in doing so, you have to take into [Tr. 780] consideration their wealth, because a fine of a large multi-national corporation must be larger than the fine for an individual. Now, we only want what's fair, what's right. Now, when you go into your room to consider the damages, the money damages that the Judge says you should award, he'll give you a verdict and there's three lines for each of these people. Tug Fork, Alliance and Goode and King. And the compensatory damages are very simple, really. All they're asking for is to get their attorney's fees back. Sixty-nine hundred to Alliance, seventy-three hundred, Tug Fork, and Goode and King, thirty-seven hundred. But this case is about their misconduct. They make a big point, well, we didn't really take that much. Heck, it was a bad well. Well, I wonder what about the criminal that comes in here and says, shucks, I didn't know that that lady leaving the bank had already made her deposit when I held her up. I thought she had a full purse. Do you send them up the river any less? Is the guilty act any more? They wouldn't have gone to this elaborate scheme —No, they wouldn't now, because they thought this was a huge, gonna be a huge money-making lease. Gonna put lots of wells on it. That's why it was worth the scheme. And the punishment should fit it, and fit the wealth. Now, how much is the wealth? The expert— They wouldn't tell us how much. We had to go out and hire a guy. They wouldn't tell us anything about the

company records. You [Tr. 781] heard that. Said they weren't available. Do you believe that the board of directors, when they ask TXO Production Corp. how they're doing, says, we don't know? How much money you making? We don't know. What's your cash flow? We don't know. Do you file tax returns? No. That's what they told us. You heard the evidence. So we go out and we reconstruct the value of this company. A two billion dollar company. Have earnings of $225,000,000.00, average. Last year made $125,000,000.00 alone. Last year. Now, what's a good fine for a company like that? A hundred thousand? A million? You can do that if you think it's fair, because when you go back into your room and discuss the money damages the Judge has told you that you ought to award in this case, I'd like you to remember what I said. If someone speaks up, well, gee, that's too much money, or that's too small, remember what Mr. Brumfield said. I hope someone will speak up and say, remember what Mr. Brumfield said? It isn't really whether the verdict is too large or too small, too big or too little. It's whether it's fair. That's what we want. We want you to be fair.

Well, what is fair? You have a—If someone comes to town and intentionally doesn't put a quarter in the meter, stays here all day, town that needs it to pay for the police force and the fire department, they give them a fine. And at the end of the day they may have to pay a dollar. That persons reaches in [Tr. 782] his billfold at the end of the day and maybe he's got a hundred bucks in there. He doesn't want to have to pay that dollar, but he does, because he knows if he doesn't, the turn is they may take his license, they may bring him into court and he may end up having to pay a hundred dollar fine. So he pays that dollar. And the next time he comes to town next Saturday, he puts his quarter in the meter. That's a fair fine. The town didn't take everything from the individual, didn't ruin them, just took one percent of what that person had in cash. One percent. You can fine TXO one percent if you want, you can fine them one

dollar if you want. But I submit to you a one percent fine, the same as John Doe on this street, would be fair. That's twelve and a half million dollars, based on what they had left over. And their earnings was $225,000,000.00. I mean, yeah, their cash flow. Their surplus. So anything between twelve and a half million and twenty-two million is only one percent—the same as this poor guy who just tried to cheat a little bit. Now, that's a lot of money. I hope, like I said, you don't analyze this on a lot or a little, but fair. Right and wrong.

I think when you do that, that's all we ask. The decision is, well, look, is it really enough? It's fair. We need to stop people from stealing people's land. Fraudulent quit claim deeds. We need to stop this. We don't want this company, we don't want other companies doing this.

[Tr. 783] THE COURT: Wrap it up, Mr. Brumfield.

MR. BRUMFIELD: If you do that, and I believe that you will, after this small amount of compensatory damages for each of these defendants, fill in the blank on punitive damages for the amount that I've suggested.

Thank you.

* * * *